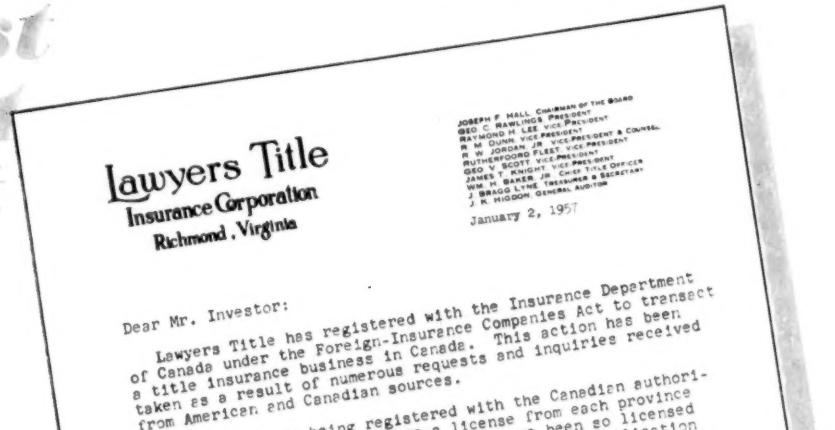
American Bar Association Journal

JANUARY 1957 • Volume 43 Number 1

first in Canada

the letter tells the story...



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January 2, 1957

Dear Mr. Investor:

Lawyers Title has registered with the Insurance Department of Canada under the Foreign-Insurance Companies Act to transact a title insurance business in Canada. This action has been taken as a result of numerous requests and inquiries received from American and Canadian sources.

In addition to being registered with the Canadian authorities it is necessary to secure a license from each province to do a title business therein and we have been so licensed by the Province of Ontario. We propose to make application for a license in other provinces as the prospects and circumstances warrant.

We will operate in Ontario through policy issuing agents and, in general, under the approved attorney plan. A policy issuing agency has been established in Toronto, under the management of David L. Gibson, 242 Brooke Avenue, which agency will issue policies on properties anywhere in the Province of Ontario until such time as other agencies are established. We have also appointed a Chief Agent for Canada whose residence is in Toronto.

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This Month's Cover

The subject of this month's cover is Louis Dembitz Brandeis, born just over a century ago in November, 1856. His work both as lawyer and jurist has left a deep mark on American law. As President Eisenhower noted in a letter to the Brandeis Centennial Commission, "His career provides a splendid example to young people of this country who have matured since his death a scant fifteen years ago."

January, 1957

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois.
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to Members of the American Law Student Association, $1.50.
Vol. 43, No. 1. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

The President's Page

David F. Maxwell

■ As a preliminary to the Association's efforts to achieve over-all administrative reform, the American Bar Association's Special Committee on Legal Services and Procedure has been urging the Congress to establish a permanent congressional committee on problems of administrative procedure. Last May, in company with other representatives of the American Bar Association, I testified before a House Rules subcommittee of the United States Congress in support of H. Res. 462 which would accomplish the result recommended by the House of Delegates in resolutions adopted last February. The fine reception given us for this important project of the organized Bar was indeed gratifying.

The tremendous growth of administrative agencies and their impact on the everyday life of almost every citizen have brought a great need for more careful review by Congress of how well agencies of government are carrying out congressional intent and how well basic requirements of fair play are observed in protecting the rights of individuals. A congressional committee with a permanent, skilled staff would work with the agencies and with other committees of Congress to obtain greater uniformity and clarity in administrative practice. This whole subject is well discussed in this issue of the JOURNAL in an article by Professor Bernard Schwartz, and we hope that the 85th Congress, meeting this month, will be able to carry to a conclusion this vital objective of our Association.

Buried under the avalanche of the Association's activities are two services which, while receiving scant attention from our members, do much to reflect credit upon the Association. These are the Traffic Court Program, under the direction of James P. Economos, on the Association side of the Center, and the services of the William Nelson Cromwell Library, under the direction of John C. Leary, on the Foundation side.

The Foundation library was established as a result of the benefaction of William Nelson Cromwell, of New York City, who died in 1948 leaving approximately $450,000 to the American Bar Association for "its library and/or research and exposition in law". Since the application of the bequest to the erection of the Bar Center, the American Bar Foundation has maintained a reading room where there is available to all of the members of the Association the William Nelson Cromwell collection as well as bar association material assembled by the legal clearing house service. One of the features of the library is the maintenance of a photocopying service which is available to all of the members of the Association. This service has proved to be of particular benefit to our members who do not have elaborate library facilities immediately available to them in their home town. If any member requires a case report, a section of a statute or an article from a legal periodical, he has but to write to the William Nelson Cromwell Library and a photocopy will be sent him at a charge of 25 cents per page, which is the library's cost. The library does its best to have copies in the mail within twenty-four hours of the receipt of the request.

On the Association side of the Center, the Association's Special Committee on Traffic Court Program, under the Chairmanship of Albert B. Houghton, of Wisconsin, has been active not only in the United States but in the Commonwealth of Puerto Rico and the Province of Ontario, Canada. It is an integral part of the broader program of the President's Committee for Traffic Safety, which is primarily concerned with curtailing the mounting toll of traffic fatalities and injuries. The problem has been accentuated in recent years not only by the increasing number of motor vehicles using our highways, which last year were estimated to have traveled an unprecedented 590 billion miles, but also by the country-wide extension of our network of public roads presently under construction by mandate of the last Congress. These developments have a decided impact upon our already overloaded court system. More than twenty million traffic violations were recorded in 1955, which placed a heavy burden upon existing facilities for the administration of traffic court justice. It is the purpose of the Traffic Court Program Committee to plan for the future so that every citizen appearing in the traffic court may be assured a just trial with dignity and dispatch. It is significant to note that the President of the United States

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Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

He Disagrees with Mr. Marx

■ I read the article by Robert S. Marx, entitled " 'Motorism', Not 'Pedestrianism': Compensation for the Automobile's Victims", published in the May, 1956, issue of the JOURNAL. In my opinion, it is a very creditable statement of the case for compensation in automobile damage cases, regardless of liability. However, I do not agree with his conclusion. The practical urgency for relieving the economic and social conditions attributable to havoc wrought by "motorism" does not, in my judgment, justify the therapy which he would apply to remedy the problem.

The reason for our divergent views lies, I am sure, in our divergent concepts of the nature and province of government. More than a hint of that divergence is contained in Judge Marx's reference, appearing upon page 480 of the JOURNAL, to "our American democracy". I do not believe that the United States is a democracy. I would not want to live under a democracy. I do not believe that a democracy would necessarily cherish freedom.

Upon the same page of the JOURNAL, Judge Marx inquires "Who would make workmen's compensation voluntary . . . ?" He poses the same question regarding unemployment and old age insurance. His answers, and concededly the answers of the majority, would certainly be in the negative, but just as certainly my own answer would be in the affirmative. Furthermore, I might answer his inquiry as to who would make workmen's compensation voluntary by pointing to the legislature of my own state, Montana. Under its law the Act is elective with regard to both the employer and the employee.

My reasons for opposing compulsory compensation, regardless of liability, are numerous. I allude to some.

1. I do not believe that the asserted analogy to workmen's compensation law is apt. Certainly it is not if you take Montana's law as an example. Under such law, either the fellow who pays or his beneficiary may elect not to be subject to the law. Judge Marx would not accord this right of election in automobile cases. And between the employer and his employee there is a privity of contract, and to be compensable the injury must have arisen in and out of the course of the employment created by that contract.

2. I do not believe that government should attempt to compel the owner of an automobile who may never be the cause of automobile damage to contribute to the cost of compensating another damaged by his own fault, by the fault of a driver for whom the owner has no responsibility, or by the fault of some other third person for whom the owner has no responsibility. Also, if the fellow who has his ilium smacked by a fender in the market place is to be compensated regardless of fault, why should he be placed in a favored category as compared with the lad whose cranium makes contact with a faulty step while descending to the market place? Does the "legal fiction" theory in which Judge Marx isolates the doctrine of liability predicated upon fault cease when it bumps into liability cases unrelated to driven automobiles? If not, let's insure everybody against everything and everybody.

3. It does not appear to me to be just to make a non-liable automobile owner contribute, for example, to the cost of compulsory compensation when a negligent pedestrian or negligent driver other than an owner makes no financial contribution. Pedestrians are responsible for automobile accidents, even though it is ludicrous to, as Judge Marx says, think of a "pedestrian, drunk or sober, running after and into the rear of an automobile".

4. I do not believe that government should attempt to compel one damaged by an automobile through the fault of another to accept Judge Marx's suggested compulsory compensation in lieu of a possible settlement or judgment predicated upon the theory of liability. If Judge Marx would accord him both remedies he is merely imposing his suggested compulsory award as an addition to the remedy presently available, regardless of whether or not his plan would give credit for compensation received under his compulsory plan in the event of a settlement or judgment obtained under the liability theory.

Judge Marx says "Our fellow Americans struck down by automobiles in their daily pursuits are as much entitled to adequate and prompt compensation as our war veterans." Again I disagree with his conclusion. I concede that for both reasons of principle and policy our war veterans, wounded or otherwise disabled in the defense of their country, should receive adequate and prompt compensation. I do not concede the general statement, howev-

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published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Insurance Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral Law, $5.00; Municipal Law, $3.00; Patent, Trade-Mark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $3.00; Taxation, $6.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois.

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Board of Editors, American Bar Association Journal, listed on page 48

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er, to the effect that all Americans struck down by automobiles in their daily pursuits are entitled to compensation. I would not impose the responsibility for compensating such a person upon anybody except the person who caused the damage. Further I do not concede that one struck down by an automobile in his daily pursuit, solely as a result of his own careless or wilful act, is entitled to compensation for having been struck.

Like Judge Marx, in the interest of human welfare I, as a lawyer, am willing to work toward solution of the problems resulting from automobile hazards. Yet, I am not therefore committed to recommend a solution, however practical it may seem to some to be, which does violence to my sense of justice. The remedy of liability without fault impresses me as unjustified pork-barrel justice.

J. T. FINLEN

Butte, Montana

Our Review Was Biased, Says Writer of Book on Reds

■ Mr. John C. Hogan's comments on my book, *Soviet Civilization*, in your issue of October, 1956, are so biased that I am taking the unusual step of protesting against a review of one of my books.

In his opening paragraph Mr. Hogan attempts to prejudice his readers against me by stating: "Corliss Lamont's background and record are well-known. He once refused to answer Senator McCarthy's questions concerning affiliation with the Reds; he was recently denied permission to enter Canada."

This statement entirely overlooks the fact that I declared under oath before the McCarthy Committee that I had never been a member of the Communist Party; and that I refused to answer questions concerning my political beliefs, personal affairs and associational activities on the grounds that such questions violated the First Amendment and went beyond the authority of the Committee. Apparently Mr. Hogan is unaware that in August, 1956, a United States Court of Appeals in a unanimous decision upheld the dismissal of my indictment and sustained my contention that the McCarthy Committee exceeded its legal powers. [*U.S.* v. *Lamont*, 236 F. 2d 312]. The Government has now dropped this case.

As to Canada, Mr. Hogan neglects to mention that the day after I was barred from the country the Canadian Government reversed the decision and permitted me to go to Toronto to speak on the subject of philosophy and civil liberties.

Since the rest of the review is written in the same tone as the first few sentences, I need hardly comment on it.

CORLISS LAMONT

New York, New York

EDITOR'S NOTE: The JOURNAL is glad to publish Mr. Lamont's letter concerning the review of his book *Soviet Civilization*, and to acknowledge the factual corrections covered by him. In this connection attention is called to the legend long appearing on the editorial page that "the editors assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention." Signed book reviews fall into that category, it being recognized that opinions may, and do, vary widely on the merits or demerits of a book offered for review. *Cf.* 37 A.B.A.J. 446-451. The JOURNAL nevertheless sincerely regrets any statement of fact concerning a book or its author which, by reason of incompleteness or otherwise, may give rise to an erroneous understanding by the reader. Hence we are pleased to present Mr. Lamont's statement in order that every reader may reappraise for himself the book review of *Soviet Civilization* in the light of all of the facts then and now applicable.

The next following letter by Pro-

(Continued on page 10)

(Continued from page 8)

fessor Ralph R. Neuhoff of St. Louis, as originally written, covered much of the same ground as Mr. Lamont's. With deletion of the duplicating material only, the rest of Professor Neuhoff's letter is reproduced, with a *nota bene* to Professor Neuhoff, who probably inadvertently overlooked it, that the case of *United States* v. *Lamont*, 236 F. 2d 312, August 14, 1956, was reviewed on page 962 of the very same October issue in which the criticized book review appeared. The fact is that the book review was prepared, submitted and put in galley proof almost simultaneously with the rendition of the Second Circuit decision, and was not thereafter further edited, the possible correlation between the book review and the decision not having been noted, although the JOURNAL was fully aware of the decision.

He Says We Were Unfair to "Soviet Civilization"

■ I wonder if you are aware of the contents of the book review of Dr. Corliss Lamont's new edition of *Soviet Civilization* which appeared in the October, 1956, number of the JOURNAL at page 957. Furthermore, I wonder how the JOURNAL permitted its columns to be abused by publishing this review.

* * *

At the time the review was published in the JOURNAL, the refusal of Dr. Lamont to answer the questions of Senator McCarthy . . . had been upheld by a unanimous decision of the United States Court of Appeals for the Second Circuit, handed down on August 14, 1956.

* * *

The decision of the Court of Appeals was widely hailed by the public press as a significant victory for due process of law. The *Boston Herald* on August 20, 1956, said with reference to this decision: "We applaud this decision, as we applauded the earlier ones, because it safeguards due process of law from the erosion of Congressional abuse." The *New York Times* on August 27, 1956, stated in part in an editorial significantly entitled "The Courts Stand Firm",

> The atmosphere of freedom and civil liberties is infinitely better than it was two or three years ago; but this encouraging situation is due more to the solid qualities of the American judiciary than to the moral courage of either political party as such. A succession of judicial opinions in recent years from the Supreme Court on down has fortified and refortified the belief of Americans in themselves and in their own great liberal and democratic traditions.
>
> It is the courts, not the political parties, that have, for example, most effectively insisted on imposing restraints on free-wheeling Congressional investigations. The most recent of such cases to be decided was one involving Corliss Lamont and two other persons in which a unanimous opinion was handed down only a few days ago by the United States Court of Appeals in this city. The court held in effect that the McCarthy committee had exceeded its jurisdiction in investigating private citizens such as Mr. Lamont, who is a writer and lecturer.

* * *

For a lay publication to be unaware of a widely publicized landmark decision in the civil rights area would be perhaps excusable, but for a great bar journal to be unaware of such a decision is lamentable if true. The other horn of the dilemma is even worse, *i.e.* that it was known but purposely omitted that the refusal of Dr. Lamont to answer Senator McCarthy's questions had been upheld as a yoeman service to the cause of the freedom of speech and of the press.

Since your readers can hardly be expected to be as ignorant as your reviewer appears to have been, I suggest that some amends be made to do what you can to repair this damage to the prestige of the JOURNAL.

RALPH R. NEUHOFF
St. Louis, Missouri

They Aren't Grumpy, Though —They Just Look That Way

■ I am always deeply interested in the issues of the JOURNAL, and I want to tell you that I cannot pass by the

(Continued on page 12)

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September issue without congratulating you upon the change of the front cover. The change shows a fine-looking man instead of a grumpy old fellow, and I am sure all of the members of the Association will be greatly pleased.

Please accept my sincere thanks.

WILLIAM HAWLEY ATWELL

United States District Court
Dallas, Texas

Admission To Practice in Federal Courts

■ Mr. Williamson's article, "Disparate Rules of Admission in the Federal Courts", appearing in the August, 1956, issue of the JOURNAL, points up a matter of importance to all attorneys who practice in federal courts. The restrictive requirements for admission to practice in many federal courts evidence a provincialism unbecoming a national judiciary system.

Of course, any applicant for admission to practice in a federal court should be qualified. But, as Mr. Williamson points out, an attorney qualified to practice in one of them is equally well qualified to practice in another. I suspect that some of the courts have been influenced more by a desire to protect the privileges of local practitioners than a desire to insure a qualified Bar.

If the United States Supreme Court were to promulgate uniform rules for admission to practice in the various courts of appeals and district courts, there are doubtless some who would decry an alleged invasion of "states' rights". However, such a theory, *i.e.*, that the granting of a license to practice in a federal court is a matter reserved to local jurisdictions, would seem difficult to justify, to say the least. In my opinion, the present hodge-podge of variant requirements for admission to the federal courts is without legal or rational basis.

RALPH K. SOEBBING

St. Louis, Missouri

Notice By the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1957 Annual Meeting and ending at the adjournment of the 1960 Annual Meeting:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

An election will be held in the State of New Hampshire to fill the vacancy caused by the resignation of Louis E. Wyman, for the term expiring at the adjournment of the 1958 Annual Meeting.

An election will be held in the State of Virginia to fill the vacancy caused by the resignation of Stuart T. Saunders, for the term expiring at the adjournment of the 1959 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1957 must be filed with the Board of Elections not later than February 15, 1957. Petitions received too late for publication in the February issue of the JOURNAL (deadline for receipt January 4) cannot be published prior to distribution of ballots, which will take place on or about February 22, 1957.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. February 15, 1957.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
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The Laws Behind Our Roads:

A Plea for a More Enlightened Attitude

by **Louis R. Morony** · ***Chairman of the Highway Laws Committee of the Highway Research Board***

▪ The automobile has made the United States the most mobile, the most travelled country in history, but the growing traffic on our highways has produced some problems unique to twentieth-century Americans. Many of these problems, Mr. Morony says, are the result of failure to supply legislation that would enable the highway engineer to make plans for the kind of road net that a nation of 60,000,000 motor vehicles needs. The article is taken from an address delivered before the Deep South Regional Meeting in New Orleans in November, 1955.

▪ We are now entering a period of highway expansion that will dwarf anything that has been done in the past. The plan was put into motion in July when President Eisenhower signed the Federal-aid Highway Act of 1956, providing for a thirteen-year multi-billion dollar program of highway improvements. This is the biggest public works program ever undertaken in the history of the world.

The Act authorizes federal-aid funds totalling $24.8 billion, to be matched by $2.8 billion by the states, for modernizing the strategic National System of Interstate and Defense Highways, consisting of 41,000 miles of the nation's most important roads and streets. The Federal Government will pay 90 per cent of the cost of the system.

In addition, the act authorizes a stepped-up federal-aid program for primary, secondary and urban systems, with funds for the next three fiscal years totalling $2.55 billion, besides $700 million available under the 1954 act. Funds for this portion of the program will be allocated on the traditional fifty-fifty federal-state matching basis.

Now let's examine briefly some of the reasons we have to undertake a highway construction program of this huge size, and more particularly, how the law has contributed to the problem.

We have in this country today some 60 million motor vehicles traveling more than 500 billion miles a year over 3.4 million miles of roads.

This represents, on the surface at least, a high degree of mobility. But how safe and how efficient has this so-called mobility become in recent years and what does the future foretell? I think all of us have a pretty good idea from our own everyday experiences as highway users.

Traffic congestion, which means unnecessary loss of time and efficiency, is costing us some $4 billion annually. And it's getting harder year by year even to hold the line against traffic accidents, let alone improve our safety record. We're now killing more than 40,000 persons annually, injuring a million and a half others, and wasting an additional $4.3 billion a year through needless accidents.

One of the big reasons for this state of affairs is the obsolescence of our highway plant. More than half of our primary road system was designed over twenty years ago. A third of our primary roads were built before 1930.

We all know some of the reasons we've fallen so far behind in our highway building—the depression, World War II, post-war inflation, the Korean War, shortage of funds. But another important factor, perhaps not quite so dramatic, but one often overlooked is the neglected state of our highway laws. Our highway statutes, in too many instances, are out of date and defective and are partly responsible for our present highway dilemma.

If we had been alert to the sad condition of our laws and had done something in time to bring them up to date, some of the expenditures which are now so urgent could have been avoided.

The fact that some of our roads need replacement is due, in many cases, to their functional rather than their physical obsolescence. Legal remedies applied in time could have

prevented that functional obsolescence.

For example, we know that a controlled access facility is designed to reduce obstacles to the free flow of through traffic by eliminating or restricting egress from, and ingress to, adjacent property by limiting the number of connections with the general pattern of roads and streets in the vicinity.

The uncontrolled entrance of vehicles onto a heavily traveled highway from numerous driveways creates extremely dangerous and congested conditions. The record shows that as more and more establishments are built adjacent to roadways, congestion and accidents increase. The high-density road often becomes, in effect, a business street and loses its value as an arterial route for through traffic. Sometimes it becomes necessary to move the through route to an entirely new location. This costly process is, of course, not in keeping with sound highway management. Control of access is the only way to prevent the re-occurrence of the ribbon development along the new location and thus preserve an investment of public funds that may run into millions of dollars.

That doesn't mean that control of access is designed to eliminate motorists' facilities and services, but rather that access to them shall be consistent with the safest and most efficient use of the facility.

While the majority of states do have legal authority to establish controlled access facilities, many of the laws do not contain all the essential elements of an effective statute.

Access Control . . . *A Legislative Problem*

I don't believe there is a subject in the field of highway law today that generates more discussion pro and con than control of access. It seems to me that the opposition to access control is due largely to a lack of understanding, for it is a truism that when people don't understand they oppose. I believe a great deal more can be done by the highway administrator and the highway engineer to educate the businessman, the highway user, the lawmaker and the legal profession as well, on the need for and advantages of control of access.

Since the public official can only act within the framework of the law, it is the responsibility of the legislature to give him the proper legal tools. If the highway official is to discharge his responsibilities to the public effectively, the law must not only be clear-cut and definite in assigning authority, but it must also reflect current requirements and, even more importantly, future needs. Failure to measure up to these general standards has been the chief weakness in many of our present highway statutes.

But let me cite some examples to support this conclusion:

In 1949, Thomas H. MacDonald, the then Commissioner of the U. S. Bureau of Public Roads, warned us about the growing inadequacy of our highway laws in terms of our post-war needs when he said:

> The tempo of growth in highway service demands has been so rapid that legislation is lagging far behind both in range and content. Highway officials, no matter how well qualified, may act only within the legal authority delegated by legislative action. The deficiency of first magnitude is legislative sanction to the state highway departments to reorganize to meet new duties, use new methods to extend their operations to new fields . . . .

Experience across the country strongly supports the fact that our highway technology and present concepts of good road management and effective intergovernmental relationships have far outrun the legislative mandate in many of our states.

The Clay Committee in its report to the President emphasized the serious need for improvement in our basic highway statutes when it stated:

> In many states the modernization of highway enabling laws is necessary, especially in connection with the acquisition of land for right-of-way, the control of access and the closer integration of State, city and county highway management. States should be encouraged to revise existing statutes where needed to permit expeditious and economical completion of the program.

Now let's take a little closer look at one of the most strategic areas in the field of highway law—land acquisition. Land acquisition probably represents the most basic of all highway functions. The provisions that relate to the highway administrator's authority to acquire right-of-way obviously are of first-rank importance and were so recognized by the Clay Committee. To avoid troublesome delays that might occur because of faulty state laws, the Committee recommended that Congress provide for the use of the federal right of eminent domain to acquire right-of-way for the interstate system, "where it is not feasible to obtain it through normal procedures under state law, and the state so requests".

This recommendation was embodied in the recently enacted Federal Aid Highway Act.

It would seem to me a matter of sound administration for a state to conduct state business under a proper state law rather than rely upon the federal right of eminent domain as an expediency.

Based on years of experience throughout the country, and in the light of our critical needs, it would seem to me that an adequate land acquisition law should contain, among other things, at least two fundamental provisions: (1) the right of immediate possession and (2) the power to acquire land for future use.

Procedures involving immediate possession have been used successfully by some states for many years. Moreover, the right of immediate possession has been sustained by the courts as a proper exercise of the constitutional power of eminent domain.

Yet, although it is generally conceded that immediate possession of land for highway purposes is a matter of paramount importance, we still find in many of our states, including a number in this region of the country, that the highway de-

partment does not have the authority to expedite the acquisition of highway right-of-way.

While in some states the department can go in and take over a piece of property immediately after filing a declaration of taking, in others, either constitutional or statutory requirements prohibit the taking of land until condemnation proceedings have been completed and the award has been made to the land owner. Procedures in others are only slightly less restrictive.

Charles D. Curtiss, present Commissioner of the Bureau of Public Roads, recently cautioned against possible delays in accelerating highway improvement because of this problem. "This could occur", he said, "if the lack of legal authority to secure rights-of-way, including control of access in some states is not remedied."

An Important Element . . . *Right-of-Way for Future Use*

Another important element in land acquisition involves the procurement of right-of-way for future use. There are literally hundreds of examples throughout the nation of roads that have become prematurely obsolete because at the time of development there was lack of authority to obtain sufficient right-of-way for future traffic. Only a minority of the states specifically authorize the use of public funds and the exercise of the powers of eminent domain for this purpose.

Such a situation hardly makes sense when you consider the fact that highway programs must be projected at least ten to twenty years ahead. From the standpoint of sound economics alone, can we afford to be shortsighted in our planning?

Yet, under many of our present laws, highway officials are unable to obtain essential right-of-way until they are practically ready to go into construction. By then, the price of the property involved may have skyrocketed.

Even where the law contains no definite restrictions as to acquisition for future use, the courts have often been reluctant to place a liberal interpretation on the statute—because they do not always fully understand the problems faced by the highway official in long-range planning.

It seems to me that if we are to meet our highway needs in a rational manner, the right-of-way problem must be better appreciated by those who have a responsibility and a stake in highway development—and that means just about everyone, the engineer, the lawyer, the legislator, the courts and the general public as well.

Recently the Committee on Condemnation and Condemnation Procedures of the American Bar Association's Section of Municipal Law commented as follows on the question of land acquisition for public use:

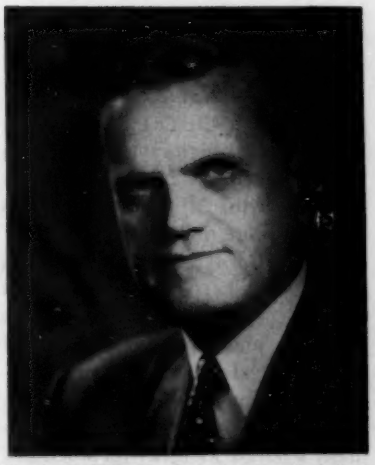
> The conflicts and confusion which now surround the forcible taking of property for public purposes in many states, bred by a multiplicity of condemnation laws and procedures, compel a resolution of this problem in the public interest.
>
> There are literally hundreds of different methods of condemning land for public purposes in the United States. Yet, there is nothing inherent in the character of the use for which such lands are being acquired, nor in the jurisdictions that are concerned to warrant any such diversity.

And if you need any further convincing, here are some additional facts:

Better Roads magazine, in a strong editorial, called for closing the gap that exists between the legal authority that highway departments have and their technical capabilities.

A. E. Johnson, Executive Secretary of the American Association of State Highway Officials, expressed his views on the problem to his own membership as follows:

> Most highway laws are based on transportation demands of years ago and are very obsolete in such fields as giving administrative authority to highway officials, providing for classification of systems, expeditious right-of-way acquisition, etc. Also many of the legal profession are not conversant with present traffic and design demands and this is reflected in the actions of the courts.



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> There has been little done to study the most desirable and successful features of highway statutes of the several States. As a rule, highway and transportation law had a common beginning from the old English concept of public roads, and subsequently all States have "pioneered" in adding or modernizing highway statutes. The pattern is heterogeneous and non-uniform.

Mr. Johnson's comments are based on broad experience in the highway field. He is a former president of the highway officials' association and served for many years as chief highway engineer for the State of Arkansas.

But to be even more specific: The Nebraska highway department as recently as July of last year described the law under which it was functioning as a "disorganized mass of archaic law" that is "no longer serviceable".

Does this sound like an extreme example? Then let's consider the present situation in Michigan where the highway statutes have been accumulating over the years to a point where they now comprise over 100 separate acts containing some 1,000 sections of law, some of which date back to the 1890's. As a result, many of the statutes not only are obsolete and overlapping, but are in direct conflict as well.

35,000 Agencies . . . *Most of Them Independent*

To make matters even more complex, consider the fact that we have some 35,000 highway agencies in this country—in states, counties, cities and towns. All of these agencies function more or less independently under authority delegated to them by law. In this perspective you can readily see the dimensions of the problem and the importance of modern legal tools to the development of a modern highway system. Doesn't the mere existence of so many separate highway jurisdictions, all of which have their roots in law, suggest the need for legal streamlining to permit them to better co-ordinate their efforts?

Hasn't the time come for us to correct this situation—to tailor the law to our needs, rather than let our needs go unmet because of legal shortcomings?

It seems to me that this is a challenge to the legal profession, and more particularly to lawyers whose work involves transportation in any form. For all transportation means are inter-related and together make up perhaps the most dynamic force in the American economy.

Certainly this problem is important to those who serve as city attorneys, legal advisers to boards, commissions or administrators in state government, and to attorneys who represent private transportation industries.

Now, how are we going to get at the solution to this problem? We certainly can't do it by being complacent about the present status of the law—unless we propose to ignore present-day realities.

My own belief, based on personal experiences, is that part of our difficulties lie in the fact that the lawyer, generally, has not taken an active enough leadership role in seeing to it that our transportation statutes do keep pace with our expanding needs.

Often, in situations where important policy decisions are at stake and where legal points are at issue, the lawyer gets into the picture too late, if at all. The tendency, and one in which attorneys too often have acquiesced, is to leave decisions largely in the hands of planners, engineers and other administrative officials. Generally, the lawyer doesn't sit in at the conference table, or ask to sit in. Can he do his job properly if he enters discussions after policies have been decided? Does he even have the understanding of a technical problem that he might need to try a case should it go to court?

We all know that courts have been reluctant sometimes to permit governmental agencies to do certain things that are designed to promote the public welfare and safety. This is particularly the case in getting advance acquisition of right-of-way for future highway purposes. The same is true in the matter of controlling access and regulating roadside development.

But how can we expect the lawyer to present such cases to the court convincingly and properly if he does not fully understand himself how important these considerations are to the over-all highway program and to the public interest generally.

Because of lack of knowledge in certain technical situations, we find some lawyers saying: "no, you can't do this or you can't do that" to the city or state highway engineer, or whoever his principal may be. He sometimes will take the negative position that if a particular matter is brought before the court, the court may give an adverse ruling. He points out that if that happens "then we will be in a bad fix".

Now, I suggest that we are not going to solve our transportation problems with that kind of thinking. More and more in business we find the lawyer who, instead of saying "no" says "yes". Or if he doesn't know for certain, will say, "give me a little more time and I'm sure I can be of some assistance on this".

We need more of that type of attitude in the transportation field. That can come only through a better understanding and more intimate knowledge on the part of the lawyer of the broad purposes and ultimate objectives of the work of the planner, the engineer, the administrator and the enforcement official.

I've been talking thus far about the darker aspects of this problem. But there are many bright spots in the picture too. For example, I referred earlier to Michigan and Nebraska. Actually, the situation in Nebraska was corrected by the legislature in 1955 by the enactment of a new body of highway law.

Michigan, too, has become concerned about the haphazard accumulation of its highway laws and a comprehensive study is now in progress in that state. Out of the study Michigan plans to develop, first, an orderly highway code, and then appraise it critically in the light of modern requirements.

Similar steps have been taken or are in process in this part of the country too—in Alabama, Louisiana, Kentucky, Florida, West Virginia, Tennessee and elsewhere. For example, Louisiana recently completed comprehensive studies of its physical needs, its fiscal requirements and its highway laws to implement a long-range program. As a result, the statutes were revised to provide for a modern classification of the state's road systems, jurisdictional lines were more clearly defined to ensure an integrated network, and the control of access law was strengthened, to mention a few of the improvements that were achieved.

I might mention, too, that the Federal Government also is concerned about its own highway laws. By direction of the Congress in the 1954 Federal Aid Highway Act, the Secretary of Commerce was requested to prepare a consolidated and up-to-date version of all the federal aid highway acts in order to facilitate their administration.

The work was done by the Bureau of Public Roads, under the direction of Henry J. Kaltenbach,

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Legislative Oversight:

Control of Administrative Agencies

by **Bernard Schwartz** · *Director of the Institute of Comparative Law at New York University*

■ **For better or for worse, administrative agencies have become a part of our government. In the complex world of today, the Congress has found it necessary to delegate vast powers to dozens of bureaus and commissions, which are thus endowed with significant control of many of our daily activities. Mr. Schwartz suggests that the problem is to find some method whereby Congress can keep control over these creatures. One possibility is a new congressional committee on administrative practice and procedure, a proposal that has been endorsed by leaders of the Bar and which will be made in the new Congress when it convenes this month.**

■ It is almost a truism that the critical point of governmental development is the consistent growth of administrative authority. The reason for such growth is not difficult to determine: it inheres in the very necessities of twentieth-century government. As President Maxwell has well stated, "The complexity of our economy, and the necessity of increased governmental regulation, made imperative the delegation of power by Congress to administrative agencies."[1] This statement was made in May, 1956, in hearings before a subcommittee of the House of Representatives' Committee on Rules, where leaders of the American Bar Association made clear that congressional action of the nature here later described was a major legislative goal of the Association.

The delegations by Congress followed no logical plan. On the contrary, the growth of the administrative process may well be described in a manner similar to that in which Topsy characterized her own genetic process. Be that as it may, however, there is little doubt that the administrative branch of the Government has now fully "growed".

What this means in practice is apparent to every lawyer and student of political science today. "One needs only", in Dean Robert G. Storey's recent words, "to look at the size of the Code of Federal Regulations and at the number of published opinions of the several agencies of the Federal Government which conduct formal administrative hearings to realize that today a greater volume of business affecting private rights is carried on by the several independent regulatory commissions, agencies, bureaus, and departments of the Federal Government than by all of the United States federal courts combined."[2] Well can it be said today that the field of administrative law is as broad as the field of National Government.[3]

According to the opinion of the Court in the celebrated *Steel Seizure* case, "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . The founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[4] Despite this constitutional principle, it can hardly be gainsaid that the administrative agency *is* today a lawmaker. Administrative lawmaking powers have, indeed, become fully comparable (both quantitatively and qualitatively speaking) to those exercised directly by the legislative and judicial branches.

It is too late in the day, to paraphrase the late Justice Jackson,[5] to

* Section 136 of the Legislative Reorganization Act of 1946 requires congressional committees to "exercise continuous watchfulness" over the execution of the laws. This duty has been frequently referred to as "legislative oversight". See, *e.g.*, caption to Sec. 136, Legislative Reorganization Act of 1946, 60 Stat. 832. See also recent statement of the President, in vetoing the Military Construction Bill, H.R. 9893: "I am persuaded that the true purpose of Congress in the enactment of both of these provisions was to exercise a close and full legislative oversight of important programs of the Department of Defense." 102 Cong. Rec. 11788 (July 16, 1956); U. S. Code, Congressional and Administrative News, 84th Cong., 2d Sess. 4558.

1. Hearings before a Special Subcommittee of the Committee on Rules, House of Representatives, under authority of H. Res. 462, 84th Cong., 2d Sess. (1956) (hereafter cited as "Hearings"), page 21.
2. Hearings 30.
3. *Ibid.*
4. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 587, 589 (1952).
5. Jackson, The Supreme Court in the American System of Government 46 (1955).

continue the argument as to whether administrative agencies vested with such powers can be fitted properly into our constitutional structure. They have now become an accepted part of the legal system. Doubtless, men may still debate as to their desirability. "In the opinion of this House", reads a famous House of Commons resolution of Stuart times, "the power of the Executive has increased, is increasing, and ought to be diminished." Presumably, there are many who would like to see a similar resolution moved in contemporary American legislatures. Yet it is not the growth of executive power as such that constitutes a great danger to our polity. Executive power properly controlled is an essential tool to enable the modern state to perform its multifold tasks. The great danger is the delegation to the executive of uncontrolled power—of power which (in Justice Cardozo's felicitous phrase) is not canalized within banks that keep it from overflowing.[6]

Administrative Agencies . . . *The Need for Safeguards*

Thus, while we may concede the need for delegations of power to administrative agencies, we may still insist on the overriding need for safeguards. To admit that the development of the administrative process is necessary does not require us to concede that it should be free of checks such as a proper balance between the general security and the individual life has led us to impose on both the legislative and judicial processes.[7] Few will dispute the need for administrative power to cope with modern conditions; at the same time, since all power is, as Madison put it, of an encroaching nature, it must be controlled by law lest it become arbitrary. In the field of administrative law, historic responsibility can never make up for the want of legal responsibility.

In our system, based as it is upon common-law concepts and traditions, there are two basic checks upon abuses of administrative power from outside the executive branch itself. These are the controls exercised by the legislative and judicial branches. Lawyers have, not unnaturally, tended to focus their attention almost entirely on the aspect of judicial control. It needs to be emphasized, all the same, that judicial review by itself cannot perform the whole job of policing the administrative process. "As an appellate judge", declares Judge David W. Peck, "I have no hesitation in stating . . . that the job of effectively controlling the administrative agencies cannot be performed by the courts alone."[8] The role of the courts is to grant relief against administrative action which is *ultra vires*. But the courts cannot ensure that the enabling statute contains effective standards to canalize delegated authority. And, if there are no such standards, judicial review becomes all too often more a matter of form than substance—"as sounding brass or a tinkling cymbal"[9] — since broad, wholesale standards do, in effect, justify almost any administrative action. In addition, it must be emphasized that, in recent years, the federal courts have tended consistently to self-limit the scope of their reviewing power. Whatever may be said about the merits of this trend, it seems clear that it has lessened the protection afforded private citizens who are adversely affected by administrative action.

For there to be truly effective checks upon administrative action, control by the courts must be supplemented by congressional oversight. The Congress is the one great organ of government that is both responsible to the electorate and independent of the executive. As the source of delegations of administrative power, it must also exercise direct responsibility over the manner in which such power is employed. The Congress does not really get rid of a subject by delegating powers to the executive. The consistent transfer of authority to the agencies only increases the difficulty, from the point of view of the effective working of representative democracy. If the trend toward bureaucratic predominance is successfully to be resisted, the Congress must not surrender control as it has delegated power. In an era of ever-expanding administrative authority the great need is for effective safeguards outside of the executive branch, by organs wholly independent of the administrative process. Such independent control can, in practice, be exercised only by the legislative and judicial branches. In this country, as already stated, we have devoted most of our attention to control by the courts as a safeguard. The technique of direct legislative supervision has largely been neglected. The development of proper techniques of congressional control can enable the Congress to assume its rightful place, proper to the elected representatives of the people, as overseer of the powers which it has delegated.

"For three quarters of a century", asserted Justice Jackson just before his death in 1954, "Congress has continued to launch these agencies without facing and resolving the administrative law problems which their functions precipitated".[10] The American Bar Association has recognized that it is the duty of the legal profession to help the Congress resolve these problems. The Association has been most active in promoting legislative reforms in administrative procedure, both in the movement which culminated in the Administrative Procedure Act of 1946[11] and in more recent efforts toward enactment of a more comprehensive agency procedural code. As far as the particular problem of congressional oversight has been concerned, the Association has also endeavored to play a pertinent part. On February 20, 1956, the House of Delegates adopted a resolution urging the establishment within the Congress of a permanent committee on administrative procedure, en-

6. *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 551 (1935).
7. Pound, ADMINISTRATIVE LAW 26 (1942).
8. Hearings 27.
9. The biblical phrase used in NLRB v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 804 (5th Cir. 1947).
10. *Loc. cit. supra*, note 5.
11. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 37 (1950).

trusted with the duty of scrutinizing the administrative process, to ensure fair play and due process and proper compliance with the Administrative Procedure Act and laws of like character.

The resolution just referred to recognizes that, as a practical matter, a legislative assembly as large as the Congress cannot possibly exercise its function of oversight of the administrative branch as an entity. If the job of oversight is to be done effectively, the responsibility must be entrusted to some body in which the Houses of Congress have confidence. In view of the constant traditions and practice of the two Houses, the most effective method of ensuring that the task of oversight will be properly performed is the constitution of a standing committee to perform that task. It is just such a committee that is contemplated by the February 20 resolution of the House of Delegates.

During the last session of the 84th Congress, House Resolution 462 was introduced by Representative Howard Smith and referred to the Committee on Rules of the House of Representatives. H. Res. 462 is essentialiy similar in its terms to the House of Delegates' resolution already referred to. It would amend the rules of the House of Representatives to provide for a standing Committee on Administrative Procedure and Practice. Such a committee would have jurisdiction over matters primarily involving

(a) Procedures of administrative agencies.

(b) Publication of rules, orders, policies and information of administrative agencies.

(c) Hearing officers of administrative proceedings.

Under the terms of H. Res. 462, such a committee would have the duty of

(1) studying complaints concerning abuses of administrative authority and the exercise of unusual and unexpected powers and the need for legislative standards to limit the exercise of administrative discretion in areas of delegated power;

(2) studying the procedures and practices of administrative agencies with a view to determining whether such procedures and practices are in accordance with law, adequately protect public and private rights, avoid undue delay and unnecessary expense, and comport with principles of fair play; and

(3) evaluating the effects of laws enacted to regulate procedures of administrative agencies.

On May 22, 23 and 24, 1956, hearings were held by a special subcommittee of the House of Representatives' Committee on Rules, under the chairmanship of Congressman Richard Bolling,[12] to hear the testimony of representatives of the American Bar Association on H. Chairman-Nominee of the Association's House of Delegates,[15] the Chairman of its Section of Administrative Law,[16] a distinguished Res. 462. Eight witnesses testified in support of the proposed committee. They included two past Presidents[13] and the President-Nominee[14] of the American Bar Association, the judge,[17] and two law professors.[18] All of the witnesses pointed to the need for more effective congressional oversight and urged the establishment of the proposed committee as a means of obtaining such oversight in practice. Their views were well summed up in the concluding statement of Rufus Poole, Chairman of the Administrative Law Section:[19]

> In conclusion, we submit that at the present time there is a serious legislative void in congressional committee structure with respect to basic legislation which concerns the administrative process as a whole throughout our Government. A new standing committee is needed to supply the specialized knowledge necessary to cope with problems of agency procedure.

Hearings on H. Res. 462 . . . *Educating the Congress*

As a practical matter, the hearings referred to were held too late in the session for any serious steps in the direction of implementing H. Res. 462 to be taken in the last session of the Congress. Indeed, the true usefulness of those hearings is to be found in the educative effect they have had, both within and without the Congress. It is in the 85th Congress, which convenes in January, 1957, that a real effort must be made to translate the terms of both the February 20, 1956, resolution of the House of Delegates and H. Res. 462 into living reality. But such an effort can be crowned with success only if it has the informed and active support of the members of the legal profession.

There are few matters to be introduced before the new Congress that will deserve more strongly the advocacy of lawyers in this country than a resolution looking toward vesting of the congressional responsibility of oversight in a special standing committee. As Cody Fowler well stated at the May 22 hearing, "I feel that it is not only desirable for this committee to be established, but also that it is absolutely essential if the Congress, in the future, is to

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12. Representatives Smith and Latham were the other two members of the subcommittee.
13. Cody Fowler and Robert G. Storey.
14. David F. Maxwell.
15. Charles S. Rhyne.
16. Rufus G. Poole.
17. David W. Peck.
18. E. Blythe Stason and the present writer.
19. Hearings 9.

fulfill the responsibilities with which it is charged by our Constitution."[20]

A committee such as that contemplated by H. Res. 462 would both scrutinize delegations of power to ensure that they are canalized, so far as practicable, by effective standards and oversee administrative procedure to ensure conformity to fair play and due process. These are, as any administrative lawyer knows, the crucial areas of our administrative law. Unless there are precise standards to limit delegations, the administrator is, in reality, being given a blank check to make law in the delegated area of authority. Statutes containing no real standards are aptly characterized as "skeleton" legislation. In such cases, the flesh and the blood—not to mention the soul—of the schemes of legislative regulation are left entirely to administrative discretion. Similarly, the procedural aspect of agency power is a vital one. If administrative agencies, in Chief Justice Hughes' words, "are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play".[21]

Such a committee would concern itself with administrative procedure and practice matters that are common to many agencies, and hence require attention on a horizontal basis for all agencies. It would also concern itself with differences in procedure and approach among the agencies, and examine whether such differences are, in fact, justified. An able permanent staff of the committee would be of invaluable assistance to the other committees of Congress, to the agencies of government, and to the individuals affected by their action, and thereby contribute materially to efficiency in government and the preservation of individual rights. Simply stated, the administrative process would then be recognized, as it needs to be, as a major area of congressional concern, paralleling the other important responsibilities with which committees of Congress are charged.

It is important to remember that the problems posed by the present-day administrative process are not entirely without precedent in our law. It is basically those problems with which the common-law world had to deal in Tudor and Stuart times. At that time also the powers of the executive were being increased to a thitherto-unprecedented degree and the jurisdiction of the ordinary courts was being superseded by a host of executive tribunals, of which the most important were the Star Chamber and Chancery. Then, too, it was the legal profession that had to assume a primary responsibility for preserving the rule of law. As Chief Justice Vanderbilt well said almost two decades ago, "Maitland, in his Rede lecture, has shown how the common lawyers of the sixteenth century met the challenge of another body of administrative law, in Chancery, in the Star Chamber and in the Privy Council—and to the great advantage of the common law.... The common lawyers of the sixteenth century met their problems and mastered them. The challenge of today is so clear that it does not need to be stated. The only question is can we meet it?"[22]

How was the problem of keeping the executive in subordination to the rule of law met by the legal profession of Tudor and Stuart times? Holdsworth, in a most suggestive portion of his masterful treatise,[23] states that the common lawyers did so by allying themselves with the Parliament of the day. It was the alliance of the lawyers and the legislature that was able to bridle the claims of the executive to unlimited power.

The parallel of Stuart times is most suggestive. We, too, are confronted with constant aggrandizement of administrative authority and the need to impose safeguards if the rule of law is to be maintained as the dominant characteristic of our polity. The answer which our predecessors gave to the question of how to curb the executive is one which we can scarcely afford to ignore. If the legal profession today, like that of Stuart England, could combine with the legislative branch to work out the necessary checks, our problem of executive power might also be resolved. Proper support for a legislative measure like H. Res. 462 is an important first step in that direction. The common lawyers of Stuart times met and mastered their problems of administrative law by combining with the Parliament to restrain executive pretensions. Can we do less than seek to follow their example?

20. Hearings 14.
21. *Morgan* v. *United States*, 304 U. S. 1, 22 (1938).
22. *The Place of the Administrative Tribunal in Our Legal System*, 24 A.B.A.J. 267, 273 (1938).
23. 6 Holdsworth, History of English Law 101 (1924).

Antitrust Law:

Consent Judgments in Merger Cases

by **Ephraim Jacobs** • *of the District of Columbia Bar*

■ **This is a discussion of the effect of the 1950 amendment of the Clayton Act, commonly known as the anti-merger statute. The author, who is Chief of the Legislation and Clearance Section of the Antitrust Division of the Department of Justice, considers three consent decrees recently entered in cases involving markets as diverse as frozen orange juice, shoes and hotels. Mr. Jacobs draws five conclusions about the merger statute from his study.**

■ At the time of this writing the Department of Justice has filed nine cases[1] alleging violations of Section 7 of the Clayton Act, as amended in 1950, commonly referred to as the anti-merger statute.[2] The Federal Trade Commission, which has concurrent jurisdiction with the Department of Justice to enforce Section 7 of the Clayton Act, has started proceedings in seventeen cases.[3]

The Department of Justice institutes these cases under Section 15 of the Clayton Act[4] which authorizes the Attorney General to bring proceedings in equity to prevent and restrain violations of that Act. The proceedings being in equity, no rigid standard is imposed on the Attorney General as to the type of relief he may seek. Thus, the prayer for relief in these cases may ask not only for divestiture of stock or assets illegally acquired, but also for an injunction against further acquisitions, if that seems appropriate, and for other relief adjusted to the requirements of the case. Against this, consider that the Federal Trade Commission has no equity jurisdiction to enforce Section 7. Its proceedings are instituted under the authority of Section 11 of the Clayton Act,[5] which requires the Commission, after a hearing and after a conclusion that the law has been or is being violated, to issue an order requiring the respondent to cease and desist from such violation, and to "divest itself of the stock, or other share capital, or assets, held" contrary to the provisions of Section 7.

The latitude as to relief which equity jurisdiction appears to afford the Justice Department in Section 7 cases may partially explain why three of the nine cases filed by the Department, namely, *Minute Maid, General Shoe* and *Hilton* have been terminated by the entry of consent judgments.[6] These three consent judgments, since they are firsts in the field, assume an importance that overrides their relationship to the

1. *U.S.* v. *Schenley Industries, Inc.* (Civil No. 1686, D. Del.); *U.S.* v. *Minute Maid Corp.* (Civil No. 6429-M, S.D. Fla.); *U.S.* v. *General Shoe Corp.* (Civil No. 2001, M.D. Tenn.); *U.S.* v. *Hilton Hotels Corp. and Statler Hotels Delaware Corp.* (Civil No. 55C 1658, N.D. Ill.) *U. S.* v. *Brown Shoe Company, Inc. and G. R. Kinney Company, Inc.* (Civil No. 10527, E.D. Mo.). *U.S.* v. *American Radiator & Standard Sanitary Corporation* (Civil No. 14469, W. D. Penn.) *U.S.* v. *Continental Can Company, Inc. and Hazel-Atlas Glass Company* (Civil No. 112-387, S. D. N.Y.): *U.S.* v. *Continental Can Company, Inc.* (Civil No. 114-117, S. D. N.Y.); *U.S.* v. *Maryland and Virginia Milk Producers Association, Inc.* (Civil No. 4482-56, Dist. Col.)

2. 15 U.S.C. §18. This section provides, among other things:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

3. *In the Matter of Foremost Dairies, Inc.* (Docket No. 6495); *In the Matter of A. G. Spalding & Bros., Inc.* (Dicket No. 6478); *In the Matter of Union Bag & Paper Corporation and Hankins Container Company* (Docket No. 6391); *In the Matter of Farm Journal, Inc.* (Docket No. 6388); *In the Matter of Crown Zellerbach Corporation* (Docket No. 6180); *In the Matter of Luria Brothers and Company, Inc., et al.* (Docket No. 6156); *In the Matter of Pillsbury Mills, Inc.* (Docket No. 6000); *In the Matter of Scovill Manufacturing Company* (Docket No. 6527); *In the Matter of Brillo Manufacturing Company, Inc.* (Docket No. 6557); *In the Matter of Scott Paper Company* (Docket No. 6559); *In the Matter of Fruehauf Trailer Co.* (Docket No. 6608); *In the Matter of The Vendo Company* (Docket No. 6646); *In the Matter of National Dairy Products Corp.* (Docket No. 6651); *In the Matter of The Borden Company* (Docket No. 6652); *In the Matter of Beatrice Foods Company* (Docket No. 6653); *In the Matter of Erie Sand and Gravel Company* (Docket No. 6670); *In the Matter of International Paper Co.* (Docket No. 6676).

4. 15 U.S.C. §25.

5. 15 U.S.C. §21.

6. The author of this article signed all of the judgments as well as the nine complaints. His comments herein express his personal views and are not necessarily consistent with the views of the Department of Justice.

particular litigation of which they are a part. They suggest what the trend might be as to relief in Section 7 cases brought by the Department of Justice, cases which will unquestionably increase in number and importance as time passes and judicial constructions on the meaning of the statute emerge.[7]

The Minute Maid Case . . . *The Freezing of Snow Crop*

The *Minute Maid* judgment was the first one entered. Its provisions will be more meaningful if a brief factual résumé is first given. The complaint, filed September 7, 1955, alleged that by its acquisition of the Snow Crop division of Clinton Foods, Inc., Minute Maid acquired control of frozen juice concentrate facilities which, when combined with its own, represented approximately 35 per cent of total industry capacity. It was also charged that the combined sales of Minute Maid and Snow Crop represented about 25 per cent of the national market. The complaint stated that three companies controlled approximately 50 per cent of the total national capacity for frozen citrus juice concentrates, and that the remaining 50 per cent was divided between approximately twenty-five other companies. Further, it was claimed that the sales of a few major companies accounted for a large part of the total national sales.[8]

On the same day the complaint was filed, the judgment was entered.[9] It attempted to accomplish, basically, two objectives. First, it sought to dissipate the "dominant" market position Minute Maid had obtained by the acquisition. Toward this it required divestiture of certain of the acquired facilities, as follows:

> (A) Within a reasonable time from the date of the entry of this Final Judgment, defendant Minute Maid shall pursuant to the terms and conditions of this Section V, dispose of as complete units, the frozen concentrate facilities located at Dunedin and Frostproof, Florida acquired by it from Clinton pursuant to a written agreement between Minute Maid and Clinton dated November 30, 1954;
>
> (B) Following the entry of this Final Judgment defendant Minute Maid shall render quarterly reports to this Court, with copies to the Attorney General, outlining in detail the efforts made by Minute Maid to dispose of such facilities. If the plaintiff herein is, at any time, dissatisfied with the progress being made in the disposition of the aforementioned facilities it may file a petition with this Court for such further orders and directions as may be necessary to effect the disposition of such frozen concentrate facilities by defendant Minute Maid;
>
> (C) Defendant Minute Maid shall take such steps as are necessary to maintain said frozen concentrate facilities at the standard of operational performance for the production of frozen concentrates in effect at the time of the entry of this Final Judgment. Pending such disposition of facilities defendant Minute Maid shall not permit said facilities to be diminished in capacity or to be turned to uses other than the production of frozen concentrates, where such use would in any manner, impair the capacity of such facilities for the production of frozen concentrates.

Second, the judgment attempted to assure that, at least for a stated period of time, Minute Maid would make no further acquisitions which would have anti-competitive effects. The applicable provision states:

> Defendant Minute Maid, for a period of five (5) years from the sale or divestiture of both the Dunedin and Frostproof, Florida frozen concentrate facilities, is hereby enjoined and restrained from acquiring, directly or indirectly, any shares of stock or other interest in, or any frozen concentrate facilities of, any person engaged in the production, distribution or sale of frozen concentrates, except upon application to this Court and after an affirmative showing to this Court that such acquisition may not tend to lessen competition or create a monopoly in the manufacture or sale of frozen concentrates.

This provision, note, shifts the burden of proof to the defendant. At the end of the five-year period Minute Maid may acquire at its own risk, and the normal procedures of Section 7 enforcement would once more prevail.

Another facet of this case should be mentioned. In acquiring Snow Crop, Minute Maid obtained the right to use the Snow Crop name on frozen citrus concentrates. This name had national appeal and its acquisition resulted in Minute Maid's having available two well-known national brands. It was believed that this might give Minute Maid a substantial competitive advantage. Whether to enjoin Minute Maid from using this asset presented a troublesome problem. It was complicated by the fact that the name was also utilized in the frozen fruit and vegetable business of Snow Crop which Minute Maid had also acquired, but concerning which no illegality was charged by the Government. The problem was resolved by a provision in the judgment which permits the Government, within two years, to petition the court for additional relief as to trade-marks or trade names. Thus the Government, by observing the actual competitive effects within this period of the use by Minute Maid of two important trade names, will be able to assess in a more practical context what additional relief, if any, may be required.

Another Step . . . *The General Shoe Case*

The judgment in the *General Shoe* case was entered in February, 1956. The alleged facts and theory of that case were quite different from *Minute Maid*. While the complaint indicates that General is one of the largest shoe producers, it did not allege a dominant market position. Further, it charged that a *series* of eighteen acquisitions, starting in 1950, cumulatively violated Section 7. It did not assert that any one of the acquisitions was independently illegal. The case involved both horizontal and vertical acquisitions.[10]

7. As of this writing, there has been no judicial opinion on the merits which construes the amended Section 7. But see *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738; 114 F. Supp. 307 (1953).

8. In agreeing to the judgment the defendant in this case, as well as the defendants in the *General Shoe* and *Hilton* cases, did not admit any violation of law.

9. This was effectuated through pre-filing negotiations which are authorized in selected cases.

10. Section 7 applies to horizontal, vertical and conglomerate acquisitions. See Report No. 1191, House of Representatives, 81st Cong., 1st Sess., page 11.

Some of the companies acquired were shoe manufacturers. Many of the acquired companies operated retail outlets, and it is probable that the acquisition by General of retail outlets was the most important aspect of the case. The theory of this part of the case may be summarized as follows: General, one of the larg est shoe manufacturers, was engaged in a program of acquiring retail outlets; many of the acquired outlets were purchasing shoes from competitors of General; after General acquired the outlets the latter would start purchasing shoes from General, and competing manufacturers would thereby be foreclosed from this market. The complaint asserted that acquisitions by General might continue unless the relief prayed for was granted. One of the principal objectives of this case, therefore, was to decelerate acquisitions by General, since each acquisition of retail outlets allegedly resulted in a potential shrinkage of the market available to competing manufacturers. To accomplish this objective the judgment provided:

> (A) Until October 1, 1956, defendant General is enjoined and restrained from acquiring, directly or indirectly, any shares of stock or assets of, or any controlling or ownership interest in, any shoe manufacturer, shoe retailer or shoe wholesaler.
>
> (B) After October 1, 1956, defendant General is enjoined and restrained, for a period of five (5) years from the date of entry of this Final Judgment, from acquiring, directly or indirectly, any shares of stock or assets of, or any controlling or ownership interest in, any shoe manufacturer, shoe retailer or shoe wholesaler except (1) with the approval of the plaintiff or (2) after an affirmative showing to the satisfaction of this Court, upon thirty (30) days notice to the plaintiff, that such acquisition will not substantially lessen competition or tend to create a monopoly in the manufacture, distribution or sale of shoes:
>
> (C) After October 1, 1956 nothing contained in this Section IV shall prevent the defendant General from acquiring, directly or indirectly, any shares of stock or assets of, or any controlling or ownership interest in, any shoe manufacturer, shoe retailer or shoe wholesaler where:
>
> (1) such corporation to be acquired faces imminent bankruptcy or will not be able to continue in business and has made bona fide efforts to sell its shares of stock or assets or other controlling or ownership interest to not less than three (3) other potential purchasers without receiving any reasonable offers from them or any other person; or
>
> (2) such acquiring will only result in the defendant General's obtaining the ownership or control of an independent outlet which is the substantially equivalent replacement of an affiliated retail outlet which the defendant has lost or is losing by reason of loss of lease or acquisition.

The judgment sought also to compensate small manufacturers in some way for part of the markets they might have lost by General's consummated acquisitions. Thus it was required:

> For each of its five (5) fiscal years (1955-1956 through 1959-1960) following the date of entry of this Final Judgment, defendant General is ordered and directed to purchase shoes produced by manufacturers other than itself and such purchases shall be at least twenty percent (20%) of the total volume of shoes sold by defendant General's affiliated retail outlets, provided, however, that defendant General may average such purchases over any two consecutive fiscal years.

This assures competing manufacturers that, for at least five years they will continue to supply some of the shoes which General sells through acquired outlets.

Additional miscellaneous provisions of interest are the following:

> For five (5) years from the date of entry of this Final Judgment defendant General is enjoined and restrained from:
>
> (A) Operating any affiliated retail outlet on a low profit margin for the purpose of injuring any independent retail outlet or outlets;
>
> (B) Knowingly receiving quantity or other discounts on purchases of any supplies, parts or component units used in the manufacture, distribution or sale of shoes which are not available to other shoe manufacturers under like or similar conditions;
>
> (C) Requiring any independent retail outlet to buy from defendant General all or any specified portion of its requirements for shoes.

Ephraim Jacobs, who started with the Department of Justice in 1944, has been Chief of the Legislation and Clearance Section of the Antitrust Division since 1952. His duties include supervision over the Antitrust Division's merger work. This involves litigation of merger cases as well as administration of the merger "clearance" program. Under the latter program, companies contemplating a merger may obtain an advance indication as to whether the Department of Justice would institute proceedings should the merger proceed. He is a graduate of Marshall College, George Washington University (LL.B.) and Georgetown University

Further, the judgment included provisions requiring the licensing of patents and technical information relating to the manufacture of shoes.

The Government did not insist on divestiture of the acquired properties in this case. There were several factors involved. First, as previously mentioned, one of the main objectives of the case was to arrest an acquisition trend, and this was accomplished by other provisions of the judgment. Second, some of the acquisitions in the allegedly illegal series were of companies in serious financial condition. Third, the operations of some of the acquired companies, including retail outlets, had been closed down. Finally, it

was anticipated that some of the properties, if divestiture were required, would be of interest only to other shoe manufacturers who were already almost as large as, or larger than, General, and who had also made prior acquisitions of their own.

The Hilton Case . . .
No Room for Competition

The third judgment was in the *Hilton* case and was also entered in February, 1956. This judgment, too, has distinguishing features. The complaint, filed in April, 1955, charged that the merger of Hilton Hotels, Inc., and Hotels Statler Corporation, two of the largest hotel chains in the United States, may result in a substantial lessening of competition or tendency to monopoly in the hotel business generally throughout the country; and specifically, that it may have these effects in the cities of New York, Washington, St. Louis and Los Angeles. In these four cities, both chains operated hotels prior to the merger. The complaint emphasized the probable effects of the merger with respect to convention business. The hotels of both chains were among the leading convention hotels in the United States. And particularly in the cities where both operated hotels, there was direct competition between them in soliciting and servicing convention business. The complaint requested the court to require divestiture of the acquired properties in New York, Washington, St. Louis and Los Angeles and such other acquired properties as might be necessary to dissipate the effects of the violation of law.

The consent judgment required divestiture as follows:[11]

> (A) Within a reasonable time after December 1, 1955, the defendants shall, pursuant to the terms and conditions of this Section IV, dispose of the Jefferson Hotel located in St. Louis, Missouri; the Mayflower Hotel located in Washington D. C.; and either the New Yorker Hotel or the Roosevelt Hotel located in New York, New York.
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> • • •
>
> (D) Beginning April 30, 1956 and continuing until consummation of the disposals required by this Section IV defendants shall render to this Court and to the plaintiff a report within 30 days after the end of each quarter, stating the efforts made by defendants to dispose of such properties and interests. If at any time the plaintiff is dissatisfied with the progress being made in the aforementioned disposals, it may file a petition with this Court for such further orders and direction as may be necessary to effect such disposals by the defendants.

Note that whereas Hilton was required to dispose of hotels, they were not the specific hotels acquired from Statler. However, the Government was satisfied on the basis of a comparability study that the hotels being divested were substantially as good, convention-wise, as were the acquired hotels. Therefore, substitution was permitted.

In the *Hilton* case the Government also obtained an injunction against future acquisitions. Here it was limited to the four key cities. The judgment states:

> Each defendant is enjoined and restrained from making any acquisition before January 1, 1961 if the effect of such acquisition will be to increase the number of listed hotels controlled by either or both defendants to more than four in New York City, N. Y., or more than one in Washington, D. C., or more than one in St. Louis, Missouri, or more than one in the composite area of Los Angeles and Beverly Hills, California.[12] Provided, however, that if at any time either defendant desires to make any acquisition prior to January 1, 1961 which would be otherwise prohibited by the foregoing, such defendant may submit a full disclosure of the facts with respect to such proposed acquisition and the reason therefor to the plaintiff for consideration. If the plaintiff shall not object to the proposed acquisition within 30 days, such acquisition shall be deemed not to be a violation of this final judgment.

The "listed hotels" referred to above were the principal convention hotels in the four cities.

In *Minute Maid, General Shoe* and *Hilton,* the Government's cases were filed after the mergers had been completed so the complaints did not seek to prevent the acquisitions. The *Brown Shoe* case is distinguishable in this respect. There the Government's complaint was filed prior to approval of the merger by the stockholders, and it sought an injunction to prevent consummation.[13] Should a consent settlement be negotiated in a case in this posture, it is probable that an undertaking not to proceed with the merger would be the only relief acceptable to the Government.

Conclusions

Several conclusions might reasonably be drawn from the above discussion. These may serve as a guide to the position the Department of Justice might take at the judgment stage of future Section 7 Clayton Act cases.[14]

1. The Department will tailor the relief to the requirements of the particular case. Sometimes the relief will be something more or less than divestiture of the stock or assets illegally acquired.

2. It is probable that the Department will insist on divestiture when the complaint alleges an acquisition of a competitor that has been a substantial factor in the industry involved.

3. When divestiture is decreed, the Department may permit it to be accomplished within a reasonable time but will require periodic progress reports. This gives the defendant a bargaining position in dealing with prospective purchasers.

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11. The defendant Hilton had voluntarily disposed of a hotel in Los Angeles prior to the entry of the judgment.

12. This is the number of hotels Hilton operated in these cities prior to the merger.

13. In an order filed on March 13, 1956, following a memorandum opinion entered December 13, 1955, the Court has permitted Brown and Kinney to proceed with the merger subject to certain conditions which would assure effective divestiture relief in the event the Government eventually prevails in the case. The Goverament also sought to enjoin the consummation of the merger involved in the *Continental Can and Hazel-Atlas* case, but the Court, in an order entered on September 13, 1956, refused to grant the Government's request for a temporary restraining order.

14. Consent orders have also been entered in two Federal Trade Commission proceedings, namely, *Union Bag* and *Scovill.* The latter order requires divestiture of the acquired properties, including equipment, trade names, patents and good will, within ninety days after service of the order on the respondent.

4. The Department will probably seek an injunction against future acquisitions in most cases. This type of relief is particularly important when divestiture is not considered essential. The nature of this injunction may depend upon whether the defendant is a chronic acquirer and whether there is a general trend towards concentration in the industry. Depending upon circumstances, the injunction might be for a stated number of years.

5. The Department, within the framework of equity jurisdiction, will seek to obtain such additional relief as may be necessary to dissipate the effects of an illegal acquisition and to aid competitors who may have been injured by the acquisition.

Activities of Sections

SECTION OF INTERNATIONAL AND COMPARATIVE LAW

■ The Midyear Meeting of the Council of the Section will be held at the Edgewater Beach Hotel in Chicago on 17 February 1957. Chairmen of Section committees who are present in Chicago at that time are cordially invited to attend the meeting. It is expected that there will be several important committee reports presented to the Council, some of which may call for recommendations to be presented to the House of Delegates at its Midyear Meeting on February 18-19.

The Section's Committees on the Pacific Settlement of International Disputes and the United Nations are being asked to study the significant action taken by the United Nations with respect to recent momentous world events occurring in Eastern Europe and the Middle East. President Maxwell has expressed his interest in such studies with the thought that the Association will lend its weight to the support of the rule of law to secure a just and lasting peace. The Section, which numbers among its members our country's outstanding international lawyers, should make a valuable and unique contribution to the solution of the complex problems facing the nations of the world.

The Section's forty-five committees have been organized for 1956-57. Under the chairmanship of Lyman M. Tondel, Jr., a Committee on Scope and Correlation of Work has been appointed to consider and make recommendations for the reorganization of the committee work of the Section. It will be the function of the committee to review the jurisdiction of the committees, eliminate overlapping of functions to the extent possible and redesignate them in order that committee titles reflect the true nature of their work. The Committee will report its recommendations to the spring meeting of the Council and Section to be held in Washington, D. C., in May. It is hoped that as an ultimate result of such recommendations the Section of International and Comparative Law will be assisted by active committees operating at the highest possible efficiency in all phases of the Section's jurisdiction.

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

■ Our Committee on Bankruptcy, which is actively pursuing its assignments during the current year, is fortunate in numbering among its forty-seven members, six Referees in bankruptcy. Referee Duberstein, of Brooklyn, Referee Friebolin, of Cleveland, Referee Kruse, of Toledo, Referee Rickles, of Indianapolis, Referee Snedecor, of Portland, and Referee Streeter, of Chicago, have all been contributing their valuable services to the assignments of the various subcommittees. The Bankruptcy Committee is also fortunate to number amongst its members three law school professors, namely, Professor Hanna, of the School of Law of Columbia University, Professor MacLachlan, of Harvard Law School, and Professor Mulder, of the Pennsylvania Law School. It is also interesting to observe that the committee includes Walter Chandler, who contributed so significantly to the comprehensive amendments to the Act in 1938, which resulted in the Act which bears his name. The Committee is correlating its efforts with those of the National Bankruptcy Conference with a view toward correcting by non-controversial amendments to the Bankruptcy Act a number of problems disclosed by recent court decisions.

Our Committee on Commercial Arbitration has helped to obtain Association approval to proposed amendments to the Uniform Arbitration Act. The Committee will remain in close contact with the Conference of Commissioners on Uniform State Laws to promote adoption of the Uniform Arbitration Act in as many states as possible during the coming sessions of the legislatures. As part of the program of the Section of Corporation, Banking and Business Law, at the next Annual Meeting of the American Bar Association in New York City in July 1957, this Committee will present a moot arbitration hearing. The parties, their attorneys, witnesses and the arbitrators will all be present at the proceedings and will function as in an actual arbitration. This program should prove to be interesting and informative to all in attendance and is expected to demonstrate the speed, efficiency, and satisfactory results of commercial arbitration proceedings.

Our Committee on States Banks is engaged in drafting a model statute covering the activities of corporate fiduciaries outside the states in which they are domiciled. It is also undertaking a study of the effect on bank mergers of various proposed amendments to the antitrust acts.

The Office of State Delegate:

Has the Time Come for a Reappraisal?

by Charles W. Pettengill · *of the Connecticut Bar (Greenwich)*

■ One of the longest debates on the floor of the House of Delegates at the last Annual Meeting in Dallas last August was on a proposal by Mr. Pettengill to prohibit men from serving simultaneously as State Delegate and on the Board of Governors of the Association. The proposal, which would have amended the Association's Constitution, received a majority of the votes of the House, but not the required two thirds of the total membership and therefore failed. The matter will come up again in February; Mr. Pettengill here explains why he wants to see the Association's Constitution so amended and goes on to examine some other problems in the organization of the governing bodies of the Association.

■ At the Dallas Annual Meeting there was majority support in the House of Delegates for a constitutional amendment which would prohibit any officer or member of the Board of Governors from serving at the same time as a State Delegate. The measure failed of passage because of the technical provision that constitutional amendments require a two-thirds vote of all the Delegates, whether present or not. When finally put to vote, there were thirty-two less votes than the required 156. Many Delegates had already left for home by that time. However, the House did direct the Committee on Scope and Correlation and the Committee on Rules and Calendar to prepare the text of a proposed amendment for consideration at the Midyear Meeting in February. Backers of the resolution expect favorable action.

Passage of the amendment would have affected three members of the Board of Governors who had either been serving in both capacities or had indicated their intention or desire to continue to do so. The proposal thus raised for the first time the issue of dual job holding. The principle was thoroughly debated in the House with sentiment clearly opposed to the idea of one man holding two such offices at the same time.

In presenting the amendment, the proposer stated that it would provide a three-year rotation during which another member of the Association from the Governor's home state might serve as a State Delegate. This would afford an opportunity for a state to be represented by two men instead of one and would serve to develop new blood and additional leadership.

In the words of the proposer: "With the membership of the American Bar Association doubled in recent years, some method must be devised to provide broader representation of the individual members and greater participation. Why should men hold two offices at the same time when there is no dearth of material available? What State Delegate will claim that there is no other Association member in his state ready, willing and capable enough to represent the state during the three years he is serving as a member of the Board of Governors?"

It may surprise many Association members to learn how widespread has been the practice in some states of permitting a State Delegate to retain that office even after his election to the Board of Governors. Although during the discussion in the House, one Delegate termed the practice ungracious and a former Chairman of the House stated that the very idea "did violence to the instincts of human nature", the practice will continue unless expressly prohibited.

The lively debate in the House brought to the fore questions which many Delegates and others have had in their minds for a long while but which have never heretofore been openly expressed. In the interest of the Association and in an attempt to devise plans for broader representation and active participation by more members, many other suggestions have been advanced.

For example, perhaps there should be two State Delegates from each jurisdiction instead of one. At present, State Delegates are selected

by the American Bar Association members in each state, the District of Columbia, Alaska, Hawaii and Puerto Rico. The State Delegate is designated the chairman of the delegation from his state, but he is frequently outnumbered by other Delegates from his state representing the state bar association, large county or city associations and other groups entitled to representation in the House of Delegates. Although he is the elected representative of the Association members in his state, the other Delegates may represent Associations or organizations with a large proportion of non-members of the American Bar Association. Typical of this situation is the State of New York where at Dallas one State Delegate represented 9096 members. At the same meeting there were eight other Delegates from New York representing other organizations or Sections. In our desire to make the House of Delegates democratic and representative, we may have overlooked the necessity of requiring a reasonable percentage of American Bar Association memberships. Why should an association or organization whose members do not support the Association within reasonable limits have the same voice in the House as all the American Bar Association members in the state? Adding an additional State Delegate would give the Association members fairer representation.

The principal advantage of being a State Delegate is the privilege it affords of nominating the officers and members of the Board of Governors. The 52 State Delegates have this authority, and comprise the Nominating Committee of the Association. Perhaps this is the main reason why a Chairman of the House of Delegates or a member of the Board of Governors is reluctant to relinquish this power as a State Delegate. But in the light of past experience and our increase in membership, is it wise for so few men to possess such great power? Particularly is this true when those members of the Board of Governors who are also State Delegates are thus enabled to participate in the nomination of Governors from other Circuits and eventually the selection of the successors from their own Circuits.

This results in arrangements for rotation among the states in each Circuit to avoid contested elections. It follows that frequently the best-qualified candidate must stand aside or wait the turn of his state while a less-capable representative of some other state takes his turn. This system also works to the great advantage of small states which in some Circuits alternate with much larger states on an equal basis. For example, in the Second Circuit, it has been the practice to rotate the office of Governor among New York, Connecticut and Vermont despite the fact that American Bar Association membership in the three states is so disproportionate. On June 30, 1956, there were 1304 American Bar Association members in Connecticut, 9096 in New York and 238 in Vermont. In the Fifth Circuit, where the rotation system also seems to be in effect, American Bar Association memberships were distributed as follows: Alabama 826, Florida 2188, Georgia 1578, Louisiana 1524, Mississippi 642, and Texas 3965. Perhaps this inequality or weakness could be eliminated to some degree were each Circuit to periodically elect one Governor at large. This would increase the membership of the Board of Governors but would assure wider and perhaps more adequate representation.

Another suggestion for assuring a faster turnover in the official family involves the office of the Chairman of the House of Delegates. Chosen now for a two-year term, the Chairman is considered the second highest officer in the Association. He is *ex officio* a member of the Board of Governors and is deemed the equivalent of Vice President.

I am informed that originally it was thought this office would be sufficient honor and responsibility for any man who could not spare the time to become President. It was considered that a two-year term in this important office would satisfy the ambition of the average member and clear the way for other men to aspire to the arduous one-year term as President.

In practice, however, the plan has not worked out that way. In recent years we find Chairmen of the House of Delegates proposed for the Presidency and several have been elected. One answer given is that the position of Chairman of the House has not been assigned sufficient importance on a national scale to challenge a man's capabilities. It is said that, although the Chairman of the House is rated next to the top and is a member of the Board of Governors, he has few duties assigned by the Constitution and By-Laws other than presiding over four meetings of the House of Delegates. Actually, the Board of Governors has designated him as Chairman of the Administration Committee, but the average member has little appreciation of the importance of his office. Perhaps this defect, if it is one, could be corrected by naming the Chairman Executive Vice President. He might even be made Chairman of the Board of Governors or otherwise recognized in some important way.

Were such a plan to be adopted, it might be provided in the Constitution that no member of the Association who has served as Chairman shall be eligible to be elected President. A man could then decide in advance to which office he would aspire and where he could perform the greater service. Would he be satisfied to preside over the legislative body of the Association acting in the capacity of Executive Vice President for two years or would he have the time and be able to expend the energy to serve for one year as President of the Association? Many men who could serve as Chairman of the House of Delegates and do so with distinction, without unnecessary sacrifice of time or injury to their professional career, could not undertake the demanding duties of the Presidency, entailing as it does continuous traveling, endless detail and constant contact with the Headquarters

Charles W. Pettengill
State Delegate from Connecticut

in Chicago.

Expanding the duties of the chairman would provide two positions of almost equal importance for two leaders of the Bar at the same time. A third position of importance could be added by creating the office of President-Elect. Election to such an office would offer a year's preparation for the Presidency and a much-needed advance period during which a lawyer could arrange his affairs and professional commitments.

Failing some such solution, perhaps the office of Chairman of the House of Delegates should be limited to a one-year term with no prohibition against election to the Presidency. The objection to a one-year term is that the Chairman would only preside over two meetings and have little opportunity to become experienced in the job. However, the advantage of a yearly turnover would seem to outweigh any theoretical disadvantage, would enable more men to enjoy national prominence and might well serve as a testing ground for future candidates for President. In the rough and tumble of the House, a man's qualities and weaknesses soon become apparent. So long as the State Delegates are empowered to nominate, no better system could be devised to appraise a man. Such a system, of course, would not eliminate candidates who had never served as Chairman or as members of the House of Delegates.

Should the situation be considered by the Committee on Scope and Correlation or be referred to a special Committee? In my opinion, most emphatically "no". The House, which is frequently described as the greatest deliberative body in the world, should itself determine the problems. The House is sometimes criticized for laying aside proposals which involve matters of policy and indicating an unwillingness to devote the time and attention necessary to adequate debate. After all, the House is the policy-making body of the American Bar Association, and if it is constantly referring matters which do not involve abstruse questions of intricate detail to committees for study and later report, it seems to me there is danger that some day it will find itself devoid of the powers and responsibilities intended to be placed upon it.

On the all important subject of nominations, I offer a novel suggestion. Would it not be refreshing if the State Delegates got into the habit of free discussion and exchange of ideas at their nominating meeting and endeavored to select for the Presidency and for the other offices, the men whom they considered best qualified, irrespective of sponsorship and even if their names were not otherwise presented? I wish this might happen sometime to see what would follow.

It seems clear that the time has come for a critical reappraisal of our administration setup. In the light of twenty years' experience, the problems raised in this article seem to me to be the most important, although the solutions suggested may not be the best answers. Nevertheless some start must be made, and the debate in the House of Delegates at Dallas justifies the assumption that other members of the Association share that opinion.

Law-Science Short Course on Legal Medicine

The Law-Science Institute, co-sponsored by the Schools of Law and Medicine at The University of Texas, and directed by Dr. Hubert Winston Smith, will conduct an intensive three-day short course, on the above subjects, in Townes Hall, Austin, Texas, February 7 - 9, 1957. Nationally known medical authorities and trial counsel will be featured in carefully integrated presentations designed to develop medico-legal aspects in depth and in a manner calculated to be of maximum interest and value to trial lawyers, physicians and other persons professionally concerned with personal injury problems. Registration fee $50.00.

Prospective registrants may obtain program details and registration data from The Law-Science Institute, Townes Hall, The University of Texas, Austin 12, Texas.

Lawyers and the Classics:

The Spreading Technological Illiteracy

by Cecil Sims · *of the Tennessee Bar (Nashville)*

▪ Mr. Sims believes that there is a dangerous tendency among members of our profession to ignore history, philosophy and the great literary classics, a knowledge of which is essential to the true professional man. "One may be a successful lawyer and confine his reading and his study to matters strictly within the field of the technical law" he says, but the lawyer who does so "has restricted himself to the satisfactions of the skilled mechanic". In this article, taken from a paper delivered at the 1956 Midwinter Meeting of the Bar Association of Tennessee, Mr. Sims urges lawyers to "pick up historic tools of culture".

▪ In Sir Walter Scott's delightful novel *Guy Mannering,* one of the outstanding characters is a lawyer who is referred to as Counsellor Pleydell. In one of the novel's episodes Counsellor Pleydell is showing Colonel Mannering around his chambers in High Street in Edinburgh. Pointing to the books on his shelves, which he described as the "best editions of the best authors", and in particular "an admirable collection of the classics", he said:

> These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect.

When one views the fragmentation that now pervades the practice of law in the United States, it seems clear that a dangerous tendency is developing in our profession under the influence of which many successful lawyers are rapidly becoming mere skilled mechanics, the inevitable result of which will be the loss of our rightful heritage as men of culture. As superior craftsmen we are, no doubt, rendering important and necessary services to our clients, but in the interest of efficiency we are forsaking leadership in public affairs and we no longer regard history and philosophy and a knowledge of the great classics of literature as essential to high professional attainments.

I will concede at the outset that one may be a successful lawyer and confine his reading and his study to matters strictly within the field of the technical law. But in my judgment the successful lawyer who fails to cultivate and to implement his practice with a knowledge of history and the great classics of literature and philosophy has deprived himself of one of our profession's greatest rewards and has restricted himself to the satisfactions of the skilled mechanic, and is in danger of losing the rightful role of architect in public affairs. To quote Bacon's aphorism: "Reading maketh a full man, conference a ready man, and writing an exact man."

The Legal Profession . . . *Technological Illiteracy?*

Lawyers, as a professional group, are becoming victims of the spreading disease of technological illiteracy. Mass mechanical substitutes, such as radio and television, are slowly conquering our taste for general outside reading as well as our belief in its usefulness as an aid in the active practice of law.

One of the most delightful and inspiring books that I have had the pleasure of reading in the last few years is one written by Catherine Drinker Bowen, entitled *Yankee from Olympus,* with the subtitle "Justice Holmes and His Family".

After being seriously wounded at the Battle of Chancellorsville, Holmes was mustered out of the Union Army at the age of twenty-four, with the grade of captain. His father, on previous occasions, had attempted to dissuade him from becoming a lawyer. Here, in the words of the author, is an incident which took place a few days later:

> The next morning Holmes knocked on the door of his father's study. "I am going to the law school," he said

without preamble.

Dr. Holmes looked up from his desk. "What is the use of that?" he said. "What's the use of that, Wendell? A lawyer can't be a great man."

The remark was instinctive. But if he had tried Dr. Holmes could not have devised a statement more provocative to his son. *"A lawyer can't be a great man. . . ."*

• • •

His father looked at him sharply. Had Wendell heard what Dean Swift had to say about lawyers? Before Wendell could reply, Dr. Holmes reached for a book on his desk. "Here!" he said. "Gulliver is talking to the Houyhnhnms. 'It is a maxim among these lawyers, that whatever hath been done before, may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind. These, under the name of precedents, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of directing accordingly.' "

Highly pleased with the aptness of the allusion, the Doctor returned Gulliver to its place. "Uncle John", he continued, "had tried the law and abandoned it. Had Wendell discussed a law career with Uncle John?"

• • •

. . . Leaving the book-lined study, leaving Gulliver and Dr. Holmes, he went over to Cambridge and signed his name in the rolls. . . . But his father's words went with him. *A lawyer can't be a great man.* When he was ninety, Wendell Holmes would quote than phrase, adding that his father had kicked him upstairs into the law and he supposed he should be grateful.

Holmes became a great lawyer, and notwithstanding his father's admonition he also became a great man, not through the mechanics of law practice but through outside reading of the great literary classics and a study of history.

It is said that Chancellor Kent, one of the great lawyers of all time, for ten years steadily divided the day into five portions and allotted them to Greek, Latin, law and business, French and English.

John Adams, writing to Thomas Jefferson in 1814, in discussing the qualifications required for legal leadership, said:

> Grammar, rhetoric, logic, ethics, mathematics, cannot be neglected. Classics . . . I must think indispensable. Natural history, mechanics, and experimental philosophy, chemistry, and so forth, at least their rudiments, cannot be forgotten. Geography, astronomy, and even history chronology, I presume, cannot be omitted.

Thomas Jefferson's idea of the fields for outside reading necessary to prepare a lawyer for leadership was set out in a letter which he wrote from Paris, France, to a friend, in which he said:

> . . . I have proposed to you to carry on the study of law with that of politics and history. Every political measure will forever have an intimate connection with the law of the land. He who knows nothing of these will always be perplexed and often fall by adversaries having the advantage of that knowledge over him. With respect to modern languages. French, as I have before observed, is indispensable.

Ignorance of History . . . *A Professional Disadvantage*

I am sure that all of us would not agree entirely with these rigid requirements as set forth by John Adams and Thomas Jefferson, but I rather believe that most of us would agree that the successful lawyer who lacks a competent knowledge of American history in these difficult days not only finds himself perplexed and confused by public events but also at times at a disadvantage in the practice of his profession.

One of the happiest occasions in my life occurred when I purchased a one-volume history of the United States, written by W. E. Woodward, entitled *A New American History,* and spent ten days reading it before an open fire in a log cabin in the wilds of Canada. As a member of the Platform Committee in the Democratic Convention in 1948 at Philadelphia, listening to the debates of the party leaders as the platform was being written, I could not help but recall Woodward's description of the platform upon which Grover Cleveland ran for President:

> Political parties go through life on tiptoe, like nurses moving about the room of a sleeping patient. There is a calculated indefiniteness about all political platforms except those of the desperate and unsuccessful groups such as the Socialists, the Greenbacks, the Populists, and the Communists, who come out and say what they mean in forthright terms. The writing of platforms is a fine art. The finished production must be interlarded with assertions about welfare, prosperity, and human happiness with which every decent citizen will instantly agree. Controversial issues must be discussed in a spirit of intelligent vagueness. Harsh and poignant declarations of policy are likely to alienate voters; besides, such declarations hamper the legislative program of the party if it wins. Everything in the document must be directed by expediency. As an intellectual product, the platform must have smoothness and curvature so that the hand may glide around it without feeling the pinch and sting of hard surfaces. That is why the Democratic Party advocated a tariff which would be fair to American industry, a declaration which was open to all sorts of interpretations, all of them pleasant.

In the light of that statement you will find it quite interesting to compare the language of the Republican and Democratic platform pledges on the subjects of labor legislation and aid to agriculture during the last presidential election. Woodward's statement has equal application to the Republican and Democratic platform planks on segregation, states' rights and foreign affairs.

It is trite and commonplace to say today that the world as a whole and our nation in particular faces as its greatest threat to extinction in its entire history the newly contrived atomic and hydrogen bombs. But one with a knowledge of history knows that this threat is no different from, nor is it any more serious than, the threat which the world faced when the English first employed the longbow in battle or when the Chinese first compounded gunpowder. There is no basic difference between the atomic age and the gunpowder age of the early Chinese dynasties, or the longbow age of the English yeomen. Each of these weapons was in its time revo-

lutionary in character and equally as destructive when compared to previously existing methods of human warfare.

Present-day events, startling as they may seem, have had many parallels in history and in historical satires found in classic literature. Let me illustrate. Today our national economy is in a flourishing condition, with a few exceptions here and there. It is said, however, that we may be facing extinction by the scourge of Communism in Europe and Asia and that we may eventually be invaded and destroyed by Russia. Now go with me to Dean Swift's immortal classic, *Gulliver's Travels,* and listen to the description given to Gulliver by the Principal Secretary of Private Affairs of the Lilliputian situation:

> . . . For [said he], as flourishing a condition as we may appear to be in to foreigners, we labor under two mighty evils: A violent faction at home, and the danger of an invasion by a most potent enemy from abroad. As to the first, you are to understand that for above seventy moons past there have been two struggling parties in this empire, under the names of Tramecksan and Slamecksan, from the high and low heels on their shoes, by which they distinguish themselves. It is alleged, indeed, that the high heels are most agreeable to our ancient constitution. But however this be, His Majesty has determined to make use of only low heels in the administration of the government and all offices in the gift of the crown, as you cannot but observe; and particularly, that His Majesty's imperial heels are lower at least by a drurr than any of his court (drurr is a measure about the fourteenth part of an inch). The animosities between these two parties run so high that they will neither eat nor drink, nor talk with each other.

Russia in 1833 . . .
A Familiar Role

It has been said with some authority that President Franklin D. Roosevelt got most of his ideas for the New Deal measures from reading a single volume entitled *Palmerston,* by Philip Guedalla. After reading this volume I was led to read Lord Palmerston's letters to his nephew, written in confidence while he was Minister of Foreign Affairs, I was somewhat startled to find that the role which Russia is playing today in world affairs has been its historic role throughout the centuries and always without success. I quote from one of these letters, dated December 3, 1833:

> Russia, however, is the only power with which we are likely to come to a real quarrel, and even with her I trust we shall be able to keep the peace. But she is pursuing a system of universal aggression on all sides, partly from the personal character of the Emperor, partly from the permanent system of her government. They are establishing in the Island of Aland, within thirty miles of Stockholm, a fortified camp to contain twenty thousand men—a measure clearly and solely offensive. They are erecting fortresses along the line of the Vistula—obviously to threaten Austria and Prussia: they are intriguing to get hold of some of the Turkish Fortresses on the Danube: and they are never quiet on the side of Persia. All these German conferences and measures are, I believe, as much Russian as Austrian. But Turkey is the most likely cause of Collision: though I think they will hardly pursue their schemes of aggrandizement there at present. The famine in the Southern provinces of Russia will make it very difficult for them to do much in the way of soldiering in those parts this year.

We could change a few names in the above quotation and it would accurately describe the situation in world affairs today. I do not say we should be less vigilant because the situation is not new, but I do say that a competent knowledge of history gives one a perspective by which present dangers may be better evaluated.

If you asked me to name the one book that has helped me most in the practice of law, one which in my opinion will aid any lawyer in the actual practice of his profession, I would select the small volume entitled *The Art of Thinking, by* Ernest Dimnet, a French *abbé,* and I would point out to you the following passage in the book:

> . . . Ask men who have developed what started them on their progress. You will often be surprised by the simplicity as well as by the variety of their answers. A few words in a book, the catalog of a mere outline of a method, the impression left by an exceptional man, his reaction to intelligence or to fatuity, the expression of his face, his very silences, may have been enough.
>
> A similar effect can be produced or, at all events, prepared, by some random sentence in pages full as these are of a desire to help thought. To some people the advice: "Read the newspaper as a page of history," will sound like an epigram. But to others it may be the starting point of a new mental life. Others again may be helped by the mere rhythm of this work, by its contents, or by its title alone. "Here, as in other things, what is wanted is a beginning and a method. The beginning belongs to God, but the method belongs to us, and it can be learned, in a few hours, even from such a book as this."

Looking, for the moment, at a knowledge of the classics merely as an aid to a lawyer in his courtroom practice, no lawyer should ever risk his client's property or liberty by cross-examining a smart woman un-

Cecil Sims has practiced in Nashville since he was graduated from Vanderbilt Law School in 1914. He has been active in politics in Tennessee and served as an officer in the 322d Infantry, 81st Division, in World War I. He is a member of the Board of Trustees of Vanderbilt University and of Meharry Medical College and for many years was a member of the Davidson County Board of Education.

less he is thoroughly familiar with Becky Sharp in Thackeray's *Vanity Fair*. I am sure that you know better than I about the pitfalls and dangers of cross-examining the typical Southern Negro character. If you do not, I refer you to Joel Chandler Harris' story where Uncle Remus told the little boy of the rabbit which climbed a tree. Confronted with the statement that no rabbit could climb a tree, Uncle Remus replied: "Well, you see, this rabbit had to climb a tree."

Space will not permit me to recount the many practical lessons to be found in Charles Dickens' faithful report of the memorable trial of the breach of promise action in *Bardell* v. *Pickwick*, other than one brief quotation from a conversation which took place between Mr. Pickwick's solicitor and Pickwick's friend Snodgrass as the jury was being selected:

> "I wonder what the foreman of the jury, whoever he will be, has got for breakfast," said Mr. Snodgrass, by way of keeping up a conversation on the eventful morning of the 14th of February.
>
> "Aha!" said Perker, "I hope he's got a good one."
>
> "Why so?" inquired Mr. Pickwick.
>
> "Highly important; very important, my dear sir," replied Perker. "A good contented well-breakfasted juryman, is a capital thing to get hold of. Discontented or hungry jurymen, my dear sir, always find for the plaintiff."

If you would learn how to make an opening statement for the plaintiff before a jury in a damage suit, hasten to become acquainted with Sergeant Buzfuz, who represented the widow Bardell, and read his dramatic and devastating peroration against the gentle, rotund, near-sighted, innocent, but greatly alarmed defendant Pickwick:

> But Pickwick, gentlemen, the ruthless destroyer of this domestic oasis in the desert of Goswell Street—Pickwick, who has choked up the well, and thrown ashes on the sward . . . Pickwick still rears his head with unblushing effrontery, and gazes without a sigh on the ruins he has made. Damages, gentlemen,—heavy damages—is the only punishment with which you can visit him; the only recompense you can award to my client. And for those damages she now appeals to an enlightened, a high-minded, a right-feeling, a conscientious, a dispassionate, a sympathizing, a contemplative jury of her civilized countrymen.

In oral argument before an appellate court an apt quotation from *Alice in Wonderland* may mean the difference between winning and losing, and at all events is far better than a reference to a doubtful precedent. I would not have you follow the example of old Father William in the poem which Alice recited upon the Caterpillar's demand:

> "In my youth," said his father, "I took to the law
> And argued each case with my wife;
> And the muscular strength, which it gave to my jaw
> has lasted the rest of my life."

But if you have a case involving the construction of doubtful words in a statute, you would be interested in the following suggestion of Humpty-Dumpty which has been quoted by eminent courts in many opinions:

> "When *I* use a word," Humpty-Dumpty said, in rather a scornful tone, "It means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty-Dumpty, "which is to be master—that's all."

If, in gloomy moments, your failure to perceive a solution for the complex problems that confront us today leads you to believe that there is no hope, read and reflect upon the entry which Samuel Pepys entered in his diary on the last day of the year nearly three centuries ago:

> . . . Thus ends the year, with great happiness to myself and family as to health and good condition in the world, blessed be God for it!! Only with great trouble to my mind in reference to the public, there being but little hopes left but that the whole nation must in a very little time be lost, either by troubles at home (the Parliament being dissatisfied, and the King led into unsettled counsels by some about him, himself considering little, and divisions growing between the King and Duke of York), or else by foreign invasion, to which we must submit if any, at this bad point of time, should come upon us, which the King of France is well able to do.

As Justice Holmes wrote to the English lawyer, Pollock, in 1887:

> Life is like an artichoke: each day, week, month, year, gives you one little bit which you nibble off—but precious little compared with what you throw away.

Our profession does not require us to be supermen, but a lawyer can be a great man. In the last analysis, in the words of George Bernard Shaw:

> . . . This is the true joy in life, the being used for a purpose recognized by yourself as a mighty one; the being thoroughly worn out before you are thrown on the scrap heap; the being a force of nature instead of a feverish selfish little clod of ailments and grievances complaining that the world will not devote itself to making you happy.

If you would restore the practicing lawyer to the high position of culture and leadership which he at one time pre-empted in his community and in the nation—if lawyers are once again to be recognized as men of wisdom, as distinguished from mere "know-how", capable of discerning the difference between sound progress and plausible innovation—in short, if we would resume our rightful role of architects instead of being only superior mechanics, we must again pick up the historic tools of culture, and we must do it notwithstanding the exhausting demands of a busy practice.

Balancing the Federal Budget:

The Proposed Byrd-Bridges Amendment

by **Robert B. Dresser** · ***of the Rhode Island Bar (Providence)***

▪ The public debt of the United States is now the greatest debt in all history, and, with the prospect of a thaw in the cold war at almost any time, it seems unlikely that 1957 is going to see any reduction in federal spending. Mr. Dresser writes of a proposed new amendment to the Constitution aimed at forcing a policy of "pay as you go" upon the Congress. The details of the plan, sponsored by Senators Byrd, Bridges and Curtis, are outlined below.

▪ One of the most important measures before the Congress of the United States is a Joint Resolution (S.J. Res. 126) introduced in the Senate by Senators Byrd and Bridges on January 25, 1956, proposing an amendment to the Constitution of the United States to require the balancing of the budget.

On June 14, 1956, there was a hearing on the resolution before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary of the United States Senate. Among the witnesses testifying for the Amendment were Senators Bridges, Byrd and Curtis, all of whom made excellent statements.*

At the time of introducing the resolution Senator Byrd issued a statement from which I quote the following:

> The Federal Government has operated in the red for a quarter of a century. If the budget is balanced this year, it will be by inadvertence; federal officials underestimated revenue from last year's business boom. Expenditures are increasing.
>
> The terrible federal debt is at or near its all-time peak, and the President has said he will ask for an extension of the $281 billion ceiling for next year.
>
> The Administration has brought in a budget requesting appropriations $9 billion higher than the total enacted for fiscal year 1955. Unexpended balances remaining to be spent out of old appropriations, as of next July 1, are estimated at $74.6 billion. These balances, together with $66.3 billion new appropriations requested by the President, would make a total of approximately $141 billion available for expenditure by federal agencies as of the beginning of the coming fiscal year.
>
> Once appropriations are made, for all practical purposes, the rate of expenditure from these balances can not be controlled by Congress under present procedures.
>
> With such a fiscal situation in view, Senator Styles Bridges, ranking minority member of the Senate Appropriations Committee, and I today are introducing a resolution for a constitutional amendment which would require Congress to stay in session each year until it has produced a balanced budget by reduction in expenditures, increased revenue, or both.
>
> The amendment, of course, would make exceptions of national emergency situations, such as war.

A Solution . . .

Provisions of the Amendment

The Amendment provides in substance as follows:

The President is required to transmit to Congress on or before the fifteenth day after the beginning of each regular session a balanced budget for the ensuing fiscal year under the laws then existing.

If Congress authorizes expenditures to be made during such ensuing fiscal year in excess of the President's estimated receipts, Congress is forbidden to adjourn for more than three days at a time until action has been taken necessary to balance the budget for such ensuing fiscal year. In case of war or other grave national emergency, if the President shall so recommend, the Congress by a vote of three fourths of all the members of each House may suspend the foregoing provisions for balancing the budget for periods, either successive or otherwise, not exceeding one year each.

The need for the Amendment is urgent. The federal budget has been balanced only three times in the twenty-five years prior to the fiscal year ending June 30, 1956. As a result, the federal debt, now amount-

*Mr. Dresser was among the witnesses testifying in favor of the Amendment.

ing to about $275 billion, is the largest debt in history. Divided equally among the 165 million people of the country, the share of each person is $1700, or a debt of $6800 for each family of four.

The interest alone on the debt is the largest single item in the federal budget, save only expenditures for national defense. Interest payments now total $7 billion—over 10 per cent of the budget.

Each increase in the debt adds to the forces of inflation. As a result of inflation caused by unbalanced budgets during the past fifteen years, the purchasing power of the dollar has been cut approximately in two. As a result, the value of all bank accounts, insurance policies, government, state and municipal bonds, and all other indebtedness has been cut in two. The losses thus inflicted upon our people have been appalling. It is high time that the practice be stopped and the necessary means taken to that end.

With the present backlog of unexpended appropriations of earlier years amounting to about $75 billion, limiting new appropriations in a given year to the receipts for that year does not mean a balanced budget. With these unspent appropriations of prior years available, the actual budget could continue out of balance for some years to come.

On May 25, 1953, Orval W. Adams, Executive Vice President of the First National Bank of Salt Lake City, Utah, made a memorable address before the Texas Bankers Association at Houston. I quote from it the following passages:

> We should know that, our depositors not being organized, they become the victims of organized groups. In the words of Virgil Jordan, who is the Chancellor of the National Industrial Conference Board: "The U.S.A. is a victim of government by subsidy, bribery, and robbery; a government willing to steal, and convert to fake money the savings of its citizens to satisfy its lust for ever increasing power." He said also: "The welfare and protection promised for the future in return for votes can only be called the cruelest and most collossal fraud that has ever been practiced on a credulous people." No doubt Dr. Jordan had in mind the dollar-political record of the past twenty years.
>
> Here is a statement proving that Dr. Jordan was not too far wrong when he referred to the "most colossal fraud that has ever been practiced on a credulous people": which wouldn't have happened had our depositors only known.
>
> A special item in this issue of MONETARY NOTES deals with losses in purchasing power of savings bonds, time deposits in banks, and life insurance policies for the period 1945-1951. Dr. Spahr estimates that the losses on these three items alone exceed $123 billion which, he says, is "approximately 65 times the loss of $1,901,000,000 of depositors in banks for the years 1921-1933." He states that "this economic disease, which is analagous to a cancerous growth, is not widely understood, partly because people's savings are remote as compared with matters relating to immediate income."
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> Daniel Webster said in 1834: "I admonish every industrious laborer in this country to be on guard against those who would perpetrate against them a double fraud—a fraud to cheat them out of their earnings by first cheating them out of their understandings. The very man above all others who has the deepest interest in sound currency, and who suffers most by mischievous legislation, is the man who earns his daily bread by his daily toil. A vast majority of us live by industry. The Constitution was made to protect this industry, to give it both encouragement and security; but above all, security."
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> On the same subject, the immortal and stalwart Southern Democrat, Thomas Jefferson, said: "To preserve our independence, we must not let our leaders load us with perpetual debt. We must make our election between economy and liberty, or profusion and servitude."
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> Loss of confidence in its money, which, in the final analysis is creeping inflation, is the greatest tragedy that can happen to any civilized state.
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> It can safely be maintained that no other country on earth could have so ruthlessly violated sound principles of economics as we have without suffering complete and absolute wreckage. Thanks to our endless and apparently inexhaustible resources, we have been able, up to date, to fight devastating wars and remain solvent. The best proof that the American pattern of government is sound, is that it has been able to stand up for the past several years, under the greatest orgy of spending that any government in any period has ever attempted in the history of civilization.

In an article recently published by the Committee for Constitutional Government in its Spotlight series, Dr. Melchior Palyi, the distinguished economist and financial expert, makes the following statement:

> Even more interesting, and more frightening, is the incredible growth of debts. By the end of 1955, the *net* indebtedness, public, corporate, and private, of the American people has reached a grand total of $657.8 billion, 3½ times the pre-World War II record of less than $180 billion at the end of 1929, while in the meantime prices have barely doubled. The significant thing is the fantastic rate of this debt-accumulation. Last year was the "best": a net increase of $51 billion, more than double the amount by which the national income has risen.

The situation is one demanding prompt action, if our national solvency is to be preserved.

As for the remedy, it would seem clear that nothing short of an amendment to the Constitution of the United States would suffice. Certainly our past experience does not justify any other conclusion.

In his statement to the Subcommittee of the Senate Judiciary Committee at the hearing on June 14, 1956, Senator Bridges made the following statement:

> Mr. Chairman, I say with all sincerity and with complete conviction that in my 20 years in the Senate I have never sponsored a resolution which I thought had more potential as far as the future welfare of this Nation is concerned than is contained in Senate Joint Resolution 126. . . . More and more I feel both the general public as well as the Congress are coming to realize the need of the provisions embodied in this resolution.

S. J. Res. 133 . . .
The Curtis Amendment

On February 1, 1956, Senator Curtis introduced in the Senate S. J. Res. 133, which follows the language of S. J. Res. 126, except

for the following two changes:

(1) There is inserted in Section 1 the following sentence:

> The President in transmitting such budget may recommend measures for additional revenue and his recommendations for the expenditure of such additional revenue.

(2) Another section, numbered "Section 2", is inserted, reading as follows:

> The Congress shall have the power to lay and collect a special tax the proceeds of which shall be applied to the payment of the principal amount of the debt of the United States.

(1) There would seem to be no objection to the first change unless it be that the President has this power without any express provision in the Constitution.

(2) The necessity for the second change is not apparent. It is submitted that Congress has this power without any express authorization in the Constitution.

Cf. United States v. *Butler,* 297 U.S. 1 (1936); *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937).

In conclusion, therefore, I submit

(1) That it is of the utmost importance to the safety and welfare of the nation that the budget be balanced in future years;

(2) That assurance of this can be obtained only through a constitutional amendment which will *require* such action by each Congress except in times of war or other grave national emergency; and

(3) That S. J. Res. 126, either with or without the changes provided in S. J. Res. 133, constitutes a suitable and effective means of accomplishing this purpose.

May I add that the Reed-Dirksen Amendment limiting the taxing power of Congress and the Byrd-Bridges Amendment limiting the spending power constitute two of the most important measures introduced in the Congress. Together they would go a long way toward safeguarding the American people against socialism and eventual bankruptcy.

Report of Board of Governors on Proposal To Establish a Section of Negligence and Workmen's Compensation Law

■ A statement has been filed with the Secretary of the Association for the establishment of a new Section of the American Bar Association entitled "Section of Negligence and Workmen's Compensation Law". The purpose of the new Section, as stated in the proposed By-Laws, is to promote the objects of the American Bar Association within the particular fields of negligence and workmen's compensation law, to further the development of the law of torts and the law relating to workmen's compensation, to promote uniformity of legislation and administration within these fields and to improve the administration of justice therein.

On May 22, 1956, the Board of Governors filed its report with the House of Delegates recommending that the proposed new Section should be established. Since publication of this report, the Board received many communications from members of the Association expressing sharply conflicting views, as a result of which the Board requested the House of Delegates to re-submit this proposal to the Board for further consideration, which was done at the last Annual Meeting. Subsequently a subcommittee of the Board was appointed to conduct a hearing on the proposed new Section. Notice of the hearing, which was held at the American Bar Center on October 25, 1956, was given to all members of the Association in the October issue of the AMERICAN BAR ASSOCIATION JOURNAL. Said notice also invited members who found it inconvenient to attend the hearing to express their views by written communications to the subcommittee. Following the hearing the Board received the report of the subcommittee and reached the following conclusion:

It appears, as was frankly stated at the hearing, that the creation of the proposed Section is sought for the purpose of advancing the aims and interests of a special group of lawyers engaged in the practice of negligence and compensation law. The American Bar Association welcomes active participation in its affairs by lawyers of every viewpoint as well as by lawyers engaged in all branches of the practice of law. But it is the opinion of the Board that it would be unwise and contrary to the objects and best interests of the American Bar Association to establish a Section for the purpose of furthering the aims and interests of a special group or faction of lawyers engaged in the negligence and compensation practice or any other phase of the practice. Rather, no new Section should be created except to serve all of the lawyers engaged in the field in question.

The Board, therefore, respectfully recommends that said proposed Section of Negligence and Workmen's Compensation Law not be established.

The Canons of Ethics:

A Reappraisal by the Organized Bar

by Philbrick McCoy · *Chairman of the Special Committee on Canons of Ethics*

■ **Nearly half a century has passed since the American Bar Association adopted its Canons of Professional Ethics, and it has been more than a quarter of a century since the last substantial changes were made in the Canons. There have been notable alterations in the legal profession in that time, alterations that reflect the tremendous social and economic revolution of the twentieth century. Because of the great change in working habits of lawyers in those years, the Board of Directors of the American Bar Foundation has appointed a Special Committee to make a thorough reappraisal of the present Canons in the light of modern circumstances. This article by Judge McCoy deals with the general plan and methods of the Committee.**

■ At its meeting in May, 1956, the Board of Directors of the American Bar Foundation took affirmative action on the report of the Special Committee of the Foundation on a plan for a long-range study of the Canons of Professional and Judicial Ethics. On receiving the report of the Committee which has been in preparation for a year, the Board directed the Committee to proceed with the study within the bounds of a substantial appropriation for its budget for the next fiscal year. In doing so, the Directors affirmatively acknowledged the responsibility of the Bar to restate its codes of ethics in a manner which will reflect the professional responsibilities of both lawyers and judges under the conditions of modern law practice.

The study now under way was undertaken at the request of the American Bar Association and is of substantial significance to all lawyers and judges and to the public. The inadequacy of the existing canons was pointed out several years ago by James Willard Hurst:

> A profession may be defined by reference to functions historically performed, or by reference to some theoretical justification for its status and privileges. In any case the concept of a profession has included the recognition of obligations owed to the society, above and beyond the personal advancement of its practitioners. At the lowest ebb in standards of education and admission, lawyers in the United States never wholly lost the tradition—expressed in 1854 by Sharswood's *Essay on Professional Ethics*—that the practice of law involved at least formal concession to standards of conduct which specially bound the bar. Yet the stated ethical principles of the profession lacked breadth and penetration; particularly were they inadequate before the challenge of the urban, industrial United States that grew after 1870. [*The Growth of American Law: The Law Makers*, (1950), page 329.]

In support of his criticism Hurst quoted these words by Mr. Justice Stone written in 1934:

> . . . we cannot expect the Bar to function as it did in other days and under other conditions. Before it can function at all as the guardian of public interests committed to its care, there must be appraisal and comprehension of the new conditions and the changed relationships of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our codes of ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. [*The Public Influence of the Bar*, 48 HARV. LAW REV. 1.]

The Initial Task . . . *A Plan for Study*

The initial task assigned to the Committee was the preparation of the plan for study which has now been submitted to the Directors of the Foundation. When the Committee was created for that purpose early in 1955, it was stated that "the project is that of examining into the actual operation of the canons of legal ethics, including canons applicable to the conduct of judges, with a view to revising or rewriting all or some of them". The Committee

was also advised that "the plan of operation, within reasonable limits, should require a careful study of the actual operation of the existing canons plus a study of the areas of professional and judicial life that the existing canons do not cover", and the drafting of new canons when found to be necessary. In short, the Committee was advised that in attaining the long-range objective, the Bar should meet the objections of such critics as Hurst and Stone and that the study should be planned accordingly.

As presently stated, to quote from the Report, the Canons of Professional Ethics "contain a mixture of statements of fundamental principles, illustrations of the application of rules to specific types of conduct, statements of the etiquette of the profession, and rules given operative force by courts in disciplinary proceedings". The Canon as adopted in 1908 were based primarily on Sharswood's *Essay on Professional Ethics*, first published in 1854 and republished as Volume 32 of the *American Bar Association Reports* in 1907, and on the first formal code of ethics in this country, called "Rules for Governing the Conduct of Attorneys", approved by the Alabama Bar Association in 1887 (118 Ala. xxii). According to the Report, "no field work was undertaken, apparently, nor was any other systematic attempt made to ascertain the spontaneous views of lawyers concerning ethical problems of practice". As Hurst said in 1950: "Sharswood's little book, the Canons of Professional Ethics adopted by the American Bar Association in 1908, and the principal additions to the Canons in 1928, authoritatively spoke the articulate conscience of the profession in the nineteenth and early twentieth centuries. In emphasis, in relative detail, in the proportionate attention given to various topics, they expressed a conscience which at its best was directed to the honorable relations between individuals, and which took little concern for the lawyer's role in the community. They paid relatively brief, and very general respects to the lawyer's obligation to maintain 'the law'." All subsequent committees of the Association which have dealt with the Canons have been limited to making suggestions for amendments and additions without attempting to re-examine the Canons as a whole.

Certainly Sharswood could not foresee the growth of new fields of practice and developments in established fields which have greatly affected the work of lawyers and judges in the century which followed the first publication of his *Essay;* nor is it likely that many of those who as members of the American Bar Association drafted and adopted the original Canons of Professional Ethics in 1908 anticipated the changes in the work of both judges and lawyers brought about by the great changes in our society and economy during the last fifty years. Perhaps the same observation may fairly be made with regard to the distinguished committee which drafted the first Canons of Judicial Ethics adopted in 1924.

With reference to the changes during the past fifty years in the work of judges and lawyers, the Committee made several specific findings. In its report to the Directors it said:

> During this period there has taken place the development of a predominantly urban, complex industrial economy with closely related, mutually dependent business units and labor unions. Changes brought about by these developments, scientific advances, two world wars and the coincident increase in the taxing and regulative activity of local, state and federal governments strongly affect the work lawyers do for individual and corporate clients, labor unions and trade associations.
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> Several of the important branches of modern law practice, such as taxation, transportation law, regulation of business, security transactions, workmen's compensation, administrative law and labor law, have appeared on the scene since 1908, and came to their full growth after 1928—the times at which most of the Canons were adopted.
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> Generally speaking, the growth in complexity of our economy has had the tendency to develop in addition to the trial lawyer, the office lawyer who works as a member of a highly organized firm or in the legal department of a corporation or government agency.
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> The shift in activity of a large segment of the Bar from advocacy to counseling and business planning is one of the trends which has been widely commented upon. A companion trend, also widely noted, is the development of specialization in the profession. As in other occupations and professions there seems to be a pronounced shift from general practice to practice in one branch of the law in which the lawyer endeavors to develop special competence.
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> There also have been significant developments in the traditional function of advocacy. The procedure and practice in the trial of cases has changed with the development of pre-trial hearings and other pre-trial discovery techniques, and with changes in the techniques of trial advocacy such as the development of "demonstrative evidence" in personal injury trials.
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> Many new types of tribunals have been created which depend largely upon the work of the lawyer as advocate. The growth and development of administrative agencies has occurred during this period, giving rise to a continuing debate over the proper role of the lawyer in the administrative process. Similarly, arbitration hearings and collective bargaining negotiations present lawyers with new tribunals to which they have adapted themselves. And with the voluminous increase of statutory law and government regulation, advocacy before legislative bodies has become a more important phase of lawyers' work.
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> The economic position of the lawyer has probably dropped substantially during the last fifty years; certainly it has during the last twenty-seven. Surveys made in 1929 and 1951 disclose that there has been a relative decrease in lawyers' income compared with that of other occupations and professions.
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> This period has also seen the emergence of businesses, indivduals and professional groups which offer services competitive to lawyers; some properly and some improperly. Many of these competitors make use of the commercial techniques of advertising and marketing.
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> During the period, significant changes have been made in the organization, education and self-discipline of the profession. This trend has been illustrated recently with the development of integrated state bars and the formation of national associations of

Western Photographic Service

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lawyers in specialized fields. There have been wide changes in requirements for admission to the bar and in legal education. The enforcement of professional standards has become a matter of particular interest to the bar and one in which great activity has been shown in some states and localities. The American Bar Association itself has grown greatly in numbers and in relative importance to the profession as a whole. Its Canons of Professional Ethics have been adopted, sometimes with some modifications, by almost all the states, and national legal associations in specialized fields have drawn heavily upon them in framing their own Canons.

The increase in disciplinary activity has given a great deal more importance to the professional codes and has put them to the test of use by bar association committees and the courts.

One of the major factors which motivated the initiation of this project was the belief that the changes in the practice of law which have materially affected the work of lawyers and judges have brought with them ethical problems for judges and lawyers which may not be covered effectively by the present Canons. On this subject the Committee reported:

Canons designed primarily for courtroom conduct of lawyers with an independent, general practice in a less complex, less industrialized, less regulated society should be objectively appraised as to their sufficiency for the various activities of lawyers under modern conditions of practice. Similarly changes in the work of judges, and the development of specialized courts and quasi-judicial tribunals such as administrative agencies and arbitration bodies may have made present Canons of Judicial Ethics inadequate or inappropriate.

The original thirty-two Canons of Professional Ethics were designed primarily for courtroom conduct, as was appropriate at the time they were drafted. They were formulated primarily for the lawyer who was in general practice. Some of the subsequent Canons and amendments dealt in a piecemeal fashion with problems which developed with changes in law practice. However, the emphasis in most of them remains upon the individual courtroom advocate. For example, the present Canons have little to say about the position of the lawyer employed by his "client", such as a house counsel for a large organization. The Canon on partnerships deals primarily with the name of the partnerships. No Canon speaks directly about the problems of the office lawyer in advising his client and in drafting legal papers for him. The Canons do not deal with many of the problems created by the development of specialization nor, except in very general terms, with the problems of a lawyer who practices before administrative agencies or legislative bodies.

Neither do the Canons of Judicial Ethics speak on the problems of the administrative adjudicator or the arbitrator, nor on the responsibilities of a judge in any of the rapidly multiplying specialized courts of limited jurisdiction such as family courts, small claims courts, and traffic courts.

Apart from the existence of new or substantially altered problems brought about by a change in the condition of law practice, there are certain traditional problems of the profession which, although covered explicitly and sometimes in detail by the present Canons, may have assumed characteristics which make it necessary to reappraise the existing professional standard in regard to them. For example, in the public field, the representation of unpopular persons or causes presents many problems; in the private field, the question of fees should be re-examined in the light of developments in the use of contingent, minimum and statutory fees.

Changes in legal education, the increase in the numbers in the profession, and the lack of personal contacts which is characteristic of the urban community have made young lawyers depend heavily upon the expressed standards for a guide in their practice. That was not necessary formerly, when students prepared for admission by apprenticeship in a lawyer's office under conditions which made it easier to acquire an understanding of the standards of the profession.

Scope and Methods . . .
The Over-all Framework

The Committee has prepared a plan for a broad study to determine the sufficiency of the present Canons and to provide information for the formulation of changed and additional standards which the study may show to be desirable. "The goal of the study", says the report, "would be a statement of the standards for lawyers and judges in their work under present conditions of practice. This statement should be in such a form as to be capable of performing the varied tasks which will be required of it in the education, guidance and discipline of the profession." The scope of the study makes it advisable to concentrate at the outset on the problems of lawyers. As that phase of the study progresses the plan for the study of the standards of judicial conduct will be completed.

The study of lawyers' professional activities will be carried on within an over-all analytic framework based upon the lawyers' professional responsibilities to the courts, to clients, to the profession and to the public. In the analysis of the material gathered, three broad categories will be used: (1) ethical standards based upon general principles; (2) the application of such standards in the work of the legal profession; and (3) the application of such standards in disciplinary proceedings.

It is believed that the methods of research to be employed have been adequately designed to provide well considered conclusions as to the adequacy or inadequacy of

the present Canons and the need for revision or restatement. For more than a year, F. B. MacKinnon, the Research Specialist assigned to the Committee, in co-operation with John C. Leary, the Librarian of the Cromwell Library at the American Bar Center, has been accumulating published material dealing with the Canons of Ethics in particular and with professional and judicial conduct in general. Collection of this material from all sources will be continued. As it becomes available it will be studied and classified as an aid to the organization of the proposed field work. According to the Report: "The distinctive and essential element of the project is a field study to determine the presently recognized professional standards of the profession, the nature of the ethical problems involved in the administration of justice and suggested solutions for such problems." The need for such a field study should be obvious; as the Committee says, it is "well aware that it cannot draw conclusions and make recommendations *in vacuo*, and that it must draw upon sources of materials on the widest possible basis. To obtain valid results, personal contacts and discussions with those concerned will be necessary. In this way the inaccuracy and superficial data which sometimes result from inquiries solely by questionnaires and correspondence can be avoided."

It is imperative that the study encompass all factors affecting the practice of law. Accordingly, the Committee will inquire into such specific aspects of law practice as the varied functions of the lawyer generally and in relation to all specialized fields of practice, the methods of organization and performance of legal work including such varied matters as the functions of house counsel for corporations and counsel for labor unions, and the scope of the individual lawyer's practice. The Committee will also take into consideration such things external to the practice of law as the economic status of the lawyer and the community in which he practices.

It is obvious that the work which has been undertaken must start in a comparatively small area, defined effectively to test at the outset the proposed methods of research. In defining its program for the coming year the Committee considered the probability that a fairly comprehensive picture of the problems in some areas can be obtained by analysis of published material, correspondence and questionnaires, supplemented by relatively little inquiry in the field. On the other hand, it also considered the likelihood that there may be relatively little published material concerning the practice in certain other areas and consequently that extensive inquiry will have to be made of individuals and groups whose work is immediately concerned with the particular topics there involved. Finally, the Committee recognized that there can be no solution to some problems without the use of both techniques in order to get a complete picture.

With these thoughts in mind five topics have been selected for immediate study. First, in relation to the professional responsibility of the lawyer to his client, the Committee will inquire into a number of things under the general heading *Fairness to Client*. These include (1) Financial relations with the client: setting fees, minimum fee schedules, statutory fees, contingent fees, advancing expenses to client, collecting fees; (2) Custody of clients' funds; (3) Business dealings with client; and (4) Commissions and rebates. Particular attention is to be directed to the problems relating to contingent fees and the custody of clients' funds.

For a number of years the Bar has become quite aware of the specialist. The Committee believes that the lawyer may have certain professional responsibilities as the result of confining his practice to a particular branch of the profession. Primarily because of the expressed desire of the patent Bar to co-operate with the Committee in its work, these matters will be studied initially in the field of patent, trademark and copyright practice.

Changes in the practice of law during the past fifty years have brought about changes in methods of organization for the performance of legal work. Preliminary studies have indicated a need for a study of the professional responsibilities of the lawyer in the legal department of a corporation, usually referred to as "house counsel". Accordingly a study of this topic has been included in the immediate work of the Committee.

Both lawyers and judges on the civil as well as on the criminal side of the court have great responsibilities with respect to the matter of publicity concerning pending cases. Surely no lawyer or judge can be unaware of the problems in this area and the attempts in recent years to cope with the situation. Canon 20 of the Canons of Professional Conduct was adopted in 1908 and has not been amended. Canon 35 of the Canons of Judicial Ethics was adopted in 1937 and amended in 1952. Recent developments make it a matter of primary importance to all concerned to determine whether, to borrow Hurst's phrase, these Canons authoritatively speak the articulate conscience of the profession, lawyers and judges alike, at the beginning of the second half of the century. Fully aware that such a determination cannot be made in a day, or perhaps in a year, the Committee has decided to initiate its study of this matter at this time.

Certain factors external to the practice of law necessarily affect the practice of every lawyer. These include such things as his economic status, the size and economics of the community in which he practices, the geographical location of that community and its local customs. Throughout its study the Committee intends to consider the effect they may have on the standards of professional conduct. On this score the initial inquiry will be confined to the Chicago metropolitan area where enough information should be available to illustrate the problems which may be involved.

If We Are To Succeed . . . *The Responsibility of the Bar*

Such is the immediate program of the Committee and a suggestion of the nature and purpose of its long-range undertaking. A word should be said in conclusion as to the part which must be taken by the Bar if that undertaking is to succeed.

During the coming months each state and local bar association and all other groups represented in the House of Delegates will be asked to designate the person or committee within such association or group to whom the Committee is to look for co-operation.

The Committee is fully cognizant of the fact that many problems with which it will be concerned have already been considered and debated across the land and that substantial material has been gathered by the protagonists on either side. To gain the advantage of such studies the Committee intends to appoint advisory committees composed of lawyers or judges to collect such material and analyze it for the benefit of the Committee. Two members of each advisory committee will be selected to represent different points of view concerning their areas of special competence. The third member will be an impartial lawyer so far as concerns the particular topic assigned to his committee. As chairman, his function will be to make sure that the other two members of his committee present a full coverage of the important practices and problems and the points of view of both sides in relation to such topic. However, it will not be the function of these advisory committees to advise on a solution of these problems, nor to debate the merits of any proposed solutions; their primary function will be to aid the Committee in securing the facts.

As often as possible the work of the Committee will be discussed at meetings of the Bar. The first of these discussions was in Dallas in August, 1956, as a part of the program of the National Conference of Bar Presidents. Another took place at the Regional Meeting held in Baltimore in October, 1956. At the outset the purpose of these discussions in which one or more members of the Committee will participate will be to explain the work of the Committee, expose the problems which must be solved, and seek the assistance which the Committee must have from the organized Bar throughout the country. As the study progresses and possible revisions of the existing Canons or proposals for new Canons take form the Committee will bring its suggestions before the Bar at similar meetings for discussion. This will be done as often as seems advisable in order to be as sure as possible that the final product of the study adequately reflects the thinking of the lawyers and judges of today.

When the work of the Committee has been completed it must have the stamp of approval of the American Bar Association. It must always be kept in mind that the Committee has been charged with reviewing the Canons of Professional and Judicial Ethics heretofore adopted by the Association with a view to their possible revision or restatement. In the final analysis the real value to our profession and to the public of any such revision or restatement will depend on the unstinted co-operation of the Bar until our task is completed.

Members of the Bar who have suggestions to offer on the revision of the Canons should send them to F. B. MacKinnon, American Bar Center, 1155 East 60th Street, Chicago 37, Illinois.

Members of the Association planning to attend the 1957 Annual Meeting in London July 24-30 should apply for passports as early as possible—preferably at least four months prior to time of departure.

Passports may be obtained from any United States Passport Agency (offices are located in New York, Chicago, New Orleans, Los Angeles and San Francisco) or from the Passport Bureau, U. S. Department of State, Washington 25, D. C. Applications may be filed with any federal, state or county court authorized to accept them.

Passport applicants must give evidence of U. S. citizenship, furnish two passport size (2½x2½) photographs and pay a $10 fee. Unless an old U. S. passport is presented, applicants must bring a witness, who may be a relative. Married couples may travel on the same passport.

A Program for Future Lawyers:

Activities of Student Bar Associations

by **Benjamin R. Wolman** • ***Former President of the Harvard Student Bar Association***

▪ **The Harvard Student Bar Association is one of 118 student bar associations throughout the United States which is affiliated with the American Law Student association. Altogether, some 30,000 law students are members of the American Bar Association sponsored American Law Student Association. Mr. Wolman describes the activities and program of these student groups, whose members, in a few years, will take their place at the Bar.**

▪ The members of the American Bar Association have a twofold basis for interest in the activities of the student bar associations. First, a portion of the annual dues paid to the American Bar Association are directed to these associations through appropriations to the Law Student Program which, under the direction and control of the Director of the Program, promotes and aids constructive work of law student groups. Second, from these student organizations come the future members of the American Bar Association. Because of these factors the members of the American Bar Association should know what the student bar associations do, what are their aims, and what are their future prospects.

It should be noted, at the outset, that the activities of each organization vary to a certain degree because of the needs of the individual school and because of the activities handled by other student organizations.

A student bar association is composed of the students of one law school and has as the governing body a group of students annually elected by the members. The members of the faculty of each school serve in an advisory capacity, giving generously of their time and energies. It is in no small measure due to their efforts that student bar associations can boast of an ever-increasing membership, attributable to a recognition of the value of such organizations.

On the national level, the parent organization is the American Law Student Association. Through this body, headed by students elected by the member organizations, the United States has been divided into twelve circuits and the student bar associations within each circuit formed into regional groups. Through the efforts of the National Adviser, James Spiro, and the American Law Student Association officers, each student bar association is supplied with a varied assortment of information relative to the practice of law such as a student journal, a legal film catalogue, a speakers' catalogue, and a substantial number of publications and other aids to be used in the preparation of activities and in counselling students. [Earl A. Hagen succeeded Mr. Spiro as National Adviser on September 1, 1956.]

While the American Law Student Association is partially self-sustaining through annual dues from the student bar associations, added financial support in the form of American Bar Association appropriations to the Law Student Program is necessary to maintain the high levels of accomplishment now found in the work of the Student Association.

The immediate goal of each student bar association is to enable the student, as a young lawyer, to broaden the scope of his scholastic preparation through a program which presents a picture of the functions and duties of a lawyer. Through such a program it is the long-range aim of the student bar associations to give the community, legal and political, a well-rounded individual aware of the responsibilities accepted by him when he chooses the law as a profession. It is hardly necessary, here, to mention the great contribution of lawyers to the activities of city, state and nation. It is enough to say that such efforts and accomplishments are attributable to the realization by lawyers of the part they play in community affairs.

While it would be impossible to list all of the activities undertaken

annually by the student bar associations, mention should be made of some of those most commonly found in the various schools. Through a series of talks, with prominent members of the legal community speaking on various aspects of practice, the student is able to get a better picture of opportunities available to him upon graduation. Such a program, coupled with a series of talks on current topics of interest, delivered by lawyers and non-lawyers, enables the student to maintain the close contact with current affairs necessary for a well-rounded background while devoting his energies to the study of law. It should be noted that programs such as those discussed above have been successful primarily because of the high degree of co-operation from men in and out of the legal profession who are willing to take time from their busy schedules to address the student bar associations. Also deserving of special note is the program in the Boston area, where students participate in the Lawyers Reference Service of the Boston Bar Association. Through their work, the students have gained the praises of the Bar Association and the added recognition of the fact that the law student is, in reality, a young lawyer.

In addition to the speakers' programs and participation in such activities as the Lawyers Reference Service and Legal Aid Bureaus, the student bar associations conduct tours of the local courts and administrative agencies, undertake various research projects for the local bar associations and committees of the American Bar Association, and conduct practice courts where the student is able to become a participant in a hypothetical problem of the type he may expect in practice. To maintain the social life of the schools, student bar associations also conduct dances, publish school newspapers and conduct tours of local points of interest. While this list is not intended to be wholly inclusive, it may be seen that the potential of such student organizations is unlimited.

Through the annual regional conferences and the national meetings, there has been a continual exchange of information enabling each organization to learn of the activities at the other schools. In this way it is possible to expand the services of the individual organizations and thereby present the members with an opportunity to derive additional benefits from their membership. Out of such meetings has come the idea for the new A.L.S.A. Life Insurance Plan which offers each student low cost life insurance on a term basis. Since this insurance is convertible at any time into one of a number of permanent plans, the student is now able to prepare for future responsibilities while his immediate ability to carry insurance is limited. Other benefits, on the national level, which have been developed through the annual meetings include the reduced rate for the AMERICAN BAR ASSOCIATION JOURNAL and the new *Student Lawyer Journal*, a magazine published five times through the school year by and for law students.

The future of the student bar associations is bright. As each year's membership lists are totalled it can be seen that the local organizations are increasing their membership. The American Law Student Association is increasing through the constant addition of new local organizations throughout the United States.

There is, however, another step which Dean Griswold, of the Harvard Law School, and others have long urged the American Bar Association to take to assist the growth of local organizations. This is to give each student bar association member the status of a junior member in the Association from the time he joins the local organization. The National Lawyers Guild offered such an affiliation to the members of its student chapters, and this was an important factor in its rapid growth immediately following the war.

*A junior membership in the American Bar Association for student bar association members would also be beneficial to the American Bar Association in that it would facilitate the acquisition of regular membership in the American Bar Association after the student has completed the steps necessary to qualify as a practicing attorney. Further, it would give the Association a greater degree of control over the activities of the student bar associations.

There is no reason to doubt that the student bar associations will continue to grow and play an increasing role in the development of the young lawyer. Each member of the American Bar Association may feel proud in knowing that through his efforts such organizations are possible and each member may be sure that future members of the American Bar Association who have been members of a student bar association bring with them a high regard for their place in the American Bar Association and the community.

* EDITOR'S NOTE. Under the present Constitution of the American Bar Association membership therein is limited to those persons who have been duly admitted to the Bar of any state.

American Bar Association:

Eightieth Annual Meeting

First Announcement of Program—New York, July 14-16, and London, July 24-30

NEW YORK

The Assembly The Assembly sessions will be held in the Grand Ballroom of The Waldorf-Astoria. The opening session is scheduled for Monday, July 15, at 10:00 A.M. The second session will be held Tuesday, July 16, at 10:00 A.M.

House of Delegates The House of Delegates will hold three meetings in the Sert Room of The Waldorf-Astoria, at 2:00 P.M. Monday, July 15, Tuesday morning, upon adjournment of the Assembly session, and 2:00 P.M. Tuesday afternoon, July 16.

The President's Reception is scheduled to be held Sunday evening, July 14. (Time and place to be announced later.)

Section Meetings Will Be Held as Follows:

Administrative Law (Thursday, Friday and Saturday, July 11, 12 and 13)

The Waldorf-Astoria The Council and Committee Chairmen will meet all day Thursday, and a luncheon has been scheduled for 12:30 P.M. Regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M. on Friday, and 10:00 A.M. and 2:00 P.M. on Saturday.

Antitrust Law (Friday and Saturday, July 12 and 13)

The Waldorf-Astoria The officers and Council members will meet in the chairman's suite on Friday, at 3:00 P.M. A business session of the Section is scheduled for Saturday at 8:30 A.M. The regular session of the Section will be held on Saturday, at 10:00 A.M.

Bar Activities (Sunday and Monday, July 14 and 15)

The Waldorf-Astoria A Council breakfast meeting has been scheduled for Sunday morning at 8:00 A.M. A regular session of the Section will be held Monday at 2:00 P.M.

Corporation, Banking and Business Law (Wednesday and Thursday, July 10 and 11)

The Waldorf-Astoria The Council and Committee Chairmen will meet all day Wednesday, in the Chairman's suite, starting at 10:00 A.M. Regular sessions of the Section will be held 10:00 A.M. and 2:00 P.M. on Thursday. A luncheon has been scheduled for Thursday at 12:30 P.M.

Criminal Law (Friday, July 12)

The Waldorf-Astoria A regular session of the Section has been scheduled for 10:00 A.M. on Friday.

Insurance Law (Sunday, Monday, Tuesday and Wednesday, July 7, 8, 9 and 10)

The Plaza Hotel The Council and Committee Chairmen will meet at 10:00 A.M., Sunday, followed by a luncheon at 12:30 P.M. A Section breakfast will be held Monday at 8:00 A.M. The annual Section luncheon will be held at 12:00 M. on Monday, followed by a regular session of the Section at 2:00 P.M. Various committee breakfast meetings have been scheduled for Tuesday and Wednesday, at 8:00 A.M. each day. Regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M. on Tuesday. A reception and a dinner dance have been scheduled for Tuesday evening. The final session of the Section will be held Wednesday at 10:00 A.M.

International and Comparative Law (Friday, July 12)

The Waldorf-Astoria The joint breakfast with the American Foreign Law Association has been scheduled for 8:00 A.M. Friday. The Council and Committee Chairmen will meet at 10:00 A.M. A regular session of the Section will be held at 2:00 P.M.

Judicial Administration (Sunday and Monday, July 14 and 15)

The Waldorf-Astoria The Council will meet at 10:00 A.M. on Sunday. A regular session of the Section will be held Monday afternoon at 2:00 P.M. The annual dinner in honor of the Judiciary of the United States is scheduled for 7:30 P.M. Monday evening.

Junior Bar Conference (Saturday, Sunday, Monday and Tuesday, July 13, 14, 15 and 16)

The Belmont Plaza A Board of Directors meeting will be held in the Chairman's suite at 10:00 A.M. on Saturday. Luncheons have been scheduled for Saturday and Sunday at 12:00 M. each day. There will be a meeting of the Executive Council and first general session on Saturday at 2:00 P.M. The Nominating, Resolutions and Award of Merit Committees will meet on Saturday at 2:00 P.M. A workshop session is scheduled for Sunday morning at 10:00 A.M. A joint meeting of the Executive Council and the second general session is planned for Monday at 2:00 P.M. A joint meeting of the old and new Council will be held at 10:00 A.M. Tuesday morning.

Labor Relations Law (Thursday and Friday, July 11 and 12)

Hotel Roosevelt The Council will meet all day Thursday in the Chairman's suite. Regular sessions of the Section will be held Friday at 10:00 A.M. and 2:00 P.M. A luncheon has been scheduled for 12:30 P.M. on Friday.

Legal Education and Admissions to the Bar joint sessions with National Conference of Bar Examiners (Wednesday, Thursday, Friday and Saturday, July 10, 11, 12 and 13)

The Waldorf-Astoria The Section Council will meet at 2:00 P.M. on Wednesday, and 9:30 A.M. and 2:00 P.M. Thursday. The Section will hold joint meetings with the National Conference of Bar Examiners, Friday morning and afternoon, and Saturday morning. A joint luncheon has been scheduled for 12:30 P.M. on Saturday. The annual meeting of the Section has been scheduled for Saturday afternoon at 2:00 P.M.

Mineral Law (Friday and Saturday, July 12 and 13)

The Ambassador Hotel The Council and Committee Chairmen will meet at 3:00 P.M. on Friday in the Chairman's suite. The regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M. on Friday, and 10:00 A.M. on Saturday.

Municipal Law (Friday and Saturday, July 12 and 13)

Hotel Roosevelt The Council will meet for breakfast at 8:00 A.M. on Friday. The regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M. on Friday, and 10:00 A.M. and 2:00 P.M. on Saturday. A luncheon has been scheduled for 12:30 P.M. Saturday. The new Council will meet at 5:00 P.M. on Saturday evening.

Patent, Trademark and Copyright Law (Saturday, Sunday, Monday and Tuesday, July 13, 14, 15 and 16)

The Biltmore Hotel The Council and Committee Chairmen will meet at 9:00 A.M. Saturday, followed by a luncheon. A symposium is scheduled for 2:00 P.M., Saturday. A meeting of the International Patent and Trademark Association will be held Sunday afternoon. A breakfast for the National Council of Patent Law Associations is scheduled for 8:00 A.M. on Monday. The regular sessions of the Section will be held at 9:00 A.M. on Sunday, 2:00 P.M. on Monday, and 9:30 A.M. and 2:00 P.M. on Tuesday. A United States Trademark Association luncheon will be held at 12:30 P.M. on Monday. The annual dinner of the Section is scheduled for Monday evening, to be preceded by a reception. The International Patent and Trademark Association luncheon is planned for Tuesday at 12:30 P.M.

Public Utility Law (Thursday, Friday and Saturday, July 11, 12 and 13)

The Ambassador Hotel The Council will meet at 2:00 P.M. on Thursday. Regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M. on Friday, and 10:00 A.M. on Saturday. A luncheon for officers, Council members and guest speakers will be held Friday at 12:30 P.M. A reception is scheduled for Friday evening at 6:00 P.M. at the *Waldorf-Astoria*.

Real Property, Probate and Trust Law (Thursday and Friday, July 11 and 12)

The Waldorf-Astoria A meeting of the Council has been scheduled for Thursday morning, followed by a luncheon. The regular sessions of the Section will be held all day Friday, at 9:30 A.M. and 2:00 P.M. There will be a breakfast meeting for officers, Council members and members of Section Committees, Friday morning at 8:00 A.M.

Taxation (Tuesday, Wednesday, Thursday, Friday and Saturday, July 9, 10, 11, 12 and 13)

The Waldorf-Astoria The officers and Council will meet in executive session at 9:30 A.M. and 2:00 P.M. on Tuesday. On Wednesday at 9:30 A.M. and 2:00 P.M. there will be meetings of the Council and Committee Chairmen. Regular sessions will be held at 10:00 A.M. and 2:00 P.M. on Thursday and 10:00 A.M. and 2:00 P.M. on Friday. The Section luncheons are scheduled for Thursday and Friday at 12:30 P.M. A regular session of the Section will be held at 10:00 A.M. on Saturday. A special session on state and local taxes is scheduled for 2:00 P.M. Saturday.

LONDON

The Assembly. The third Assembly session will open with church services at Westminster Abbey and Westminster Cathedral on Wednesday, July 24, at 10:00 A.M., followed by the presentation of the Assembly of the American Bar Association to the Lord Chancellor and Her Majesty's Judges in Westminster Hall, at 11:00 A.M. The fourth Assembly session is scheduled for Friday, July 26, at 2:00 P.M., in Festival Hall. The Runnymede Ceremony commemorating Magna Charta (fifth Assembly session) will be held Sunday, July 28, at 3:00 P.M. The sixth Assembly session will be held immediately following adjournment of the House of Delegates, Tuesday, July 30. There is an Association dinner being planned for Monday evening, July 29, in the Great Room of Grosvenor House, at which an outstanding Englishman will be guest speaker.

The **House of Delegates** will meet in the Lancaster Room of the Savoy Hotel, on Thursday, July 25; Friday, July 26; Tuesday, July 30, at 10:00 A.M. each day.

There will be joint committee sessions of English and United States lawyers held on Thursday and Friday mornings, July 25 and 26. Two sessions will be held simultaneously each morning at 10:00 A.M. The subjects to be discussed are: Publicity Attendant Upon Trials; Probate Law—Estate Planning and Taxes; Use of the Jury in England and the United States; and Negligence —a Comparative Review of the Effect of Contributory Negligence in England and the United States.

Section Meetings

Administrative Law (Friday, July 26)

Grosvenor House A regular session of the Section will be held at 10:00 A.M. on Friday.

Antitrust Law (Thursday, July 25)

Grosvenor House A regular session of the Section will be held at 10:00 A.M., Thursday, followed by a luncheon at 12:30 P.M.

Corporation, Banking and Business Law (Thursday, July 25)

The Dorchester The regular session of the Section will be held at 2:30 P.M. on Thursday.

Criminal Law (Thursday, Friday, Monday and Tuesday, July 25, 26, 29 and 30)

Regular sessions of the Section will be held Thursday and Friday mornings and all day Monday (meeting place to be announced later). Tours of Scotland Yard, and Wormwood Scrubbs (English prison) are being arranged for Monday and Tuesday afternoons. A luncheon has been scheduled for 12:30 P.M. on Monday at *Grosvenor House*.

Insurance Law (Thursday, July 25)

Grocers' Hall A general session of the Section will be held at 10:30 A.M. on Thursday.

International and Comparative Law (Thursday, July 25)

The Dorchester The Section will hold a regular session at 10:00 A.M. on Thursday followed by a joint luncheon with the Junior Bar Conference at 12:30 P.M.

Judicial Administration (Thursday and Friday, July 25 and 26)

Savoy Hotel Regular sessions of the Section will be held on Thursday and Friday at 10:00 A.M. each day. A luncheon has been scheduled at 12:30 P.M. on Friday for federal and state judges.

Junior Bar Conference (Thursday and Saturday, July 25 and 27)

The Dorchester A general session of the Conference will be held at 10:00 A.M. on Thursday. A joint luncheon with the Section of International and Comparative Law is scheduled for Thursday at 12:30 P.M. A reception and cocktail party is being planned for 5:30 P.M. Saturday.

Labor Relations Law (Thursday and Friday, July 25 and 26)

Whitehall Court Regular sessions of the Section have been scheduled for Thursday and Friday mornings at 10:00 A.M. each day.

Legal Education and Admissions to the Bar (Monday, July 29)

University of London A regular session of the Section will be held at 10:00 A.M. on Monday, followed by a luncheon at 12:30 P.M. tendered by the University of London.

Mineral Law (Friday, July 26)

The Dorchester A regular session of the Section has been scheduled for 10:00 A.M. and 2:00 P.M. on Friday.

Patent, Trademark and Copyright Law (Thursday and Friday, July 25 and 26)

Park Lane Hotel Regular sessions of the Section will be held at 10:00 A.M. on Thursday and Friday.

Public Utility Law (Thursday and Friday, July 25 and 26)

Charing Cross Hotel Regular sessions of the Section will be held at 10:00 A.M. on Thursday and Friday. A luncheon has been scheduled for 12:30 P.M. on Friday.

Real Property, Probate and Trust Law (Friday, July 26)

Grosvenor House Regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M. on Friday.

Taxation (Thursday, July 25)

Park Lane Hotel A regular session of the Section will be held at 9:00 A.M. on Thursday.

(Completed programs will appear in a later issue of the AMERICAN BAR ASSOCIATION JOURNAL and the Program for the New York-London meeting.)

AMERICAN BAR ASSOCIATION

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EDITORIAL OFFICES

1155 East 60th Street .....Chicago 37, Ill.

Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■ *A Democratic Organization*

Few organizations escape the charge of being run by cliques. Occasionally, this charge has been made against the American Bar Association, no doubt because at times the same members serve over the years in various capacities.

The organization of the American Bar Association is about as democratic as can be imagined. The governing body of the Association is the House of Delegates of approximately two hundred and thirty-five members composed of State Delegates, Assembly Delegates, bar organization Delegates, Section Delegates and a comparatively few *ex officio* Delegates, such as past and present Presidents and Chairmen of the House of Delegates. The State Delegates, who nominate the officers and the Board of Governors, usually after a spirited contest, are themselves elected by members of the American Bar Association from the states represented. Additional nominations for officers and the Board of Governors may be made by petition as provided by the Constitution. Assembly Delegates are elected by members present at the Annual Meetings. At the Dallas meeting seventeen members were nominated from all parts of the country for five vacancies among the Assembly Delegates. The bar organization Delegates are elected by the bar organizations in the several states. The Section Delegates are elected by the Sections. The "Red Book" Directory of the Association lists some two thousand members from all of the states, the District of Columbia, Alaska, Hawaii and Puerto Rico who are serving the Association in various capacities. Anyone who has attempted to get new legal blood to accept responsible positions will understand why the elected officials so often turn for assistance to those members of the Bar who have been active in its affairs and who, from experience, can be counted upon successfully to perform assigned tasks.

If there are cliques they must be found at the state Bar and Section levels, not at the top.

Editor to Readers

■ *The following opinion was written by Mr. Justice Frankfurter as Circuit Justice and is published here because of its general interest to the Bar.*

John Ward and Michael Bowers, Petitioners, *v.* United States of America } On Petition for Admission to Bail

[August 8, 1956.]

■ MR. JUSTICE FRANKFURTER, as Circuit Justice.

This is a petition for bail pending an appeal before the Court of Appeals for the Second Circuit from a conviction for evasion of income taxes, in violation of 26 U.S.C. §145 (b). An indictment against the petitioners, together with some co-defendants, was filed on July 29, 1953. They were arraigned on July 30, 1953, but not brought to trial till February 6, 1956. After a seven-weeks trial, they were found guilty, and on April 16, 1956, Bowers was sentenced to five years' imprisonment and Ward to four years' imprisonment, with an additional fine of $10,000 for each. An application for bail was denied by the trial court. A notice of appeal was duly filed and made the basis of a motion for bail before the Court of Appeals after its denial by the District Court and by a single Circuit Judge. The motion was made on May 2, argument was heard on May 7, and after some intermediate steps the Court of Appeals denied the motion, on June 4, 1956. Thereupon, a petition for bail came before me, sitting as *ad hoc* Circuit Justice, since my brother HARLAN, the regular Circuit Justice for the Second Circuit, had recused himself.

When the Court of Appeals disposed of the motion for bail, on June 4, 1956, the Rule then in force for admission to bail after conviction was as follows:

Bail may be allowed pending appeal or certiorari only

> if it appears that the case involves a substantial question which should be determined by the appellate court. . . . [Rule 46 (a) (2) of the Federal Rules of Criminal Procedure.]

But on April 9, this Court had submitted to Congress a new Rule 46 (a) (2), to take effect on July 9, 1956. It reads:

> Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. . . .

Obviously, as the Government recognizes, the amendment has greatly liberalized the basis for admission to bail in the federal courts pending an appeal from a conviction. By the time the matter first came before me, the new Rule was law. Since the Court of Appeals had denied bail without giving reasons, I could not tell whether they took into account the changed situation presented by the Rule which was then in process of becoming, though it was not formally, effective. Accordingly, it seemed to me appropriate that the lower courts should have an opportunity to pass upon the petition for bail under the standards that now govern. I therefore, on July 13, remanded the matter to the Court of Appeals for direct disposition by it, or for further consideration by the District Court. The Court of Appeals took the latter course and on July 17 determined that the request for bail should again be passed on by the trial judge. After further hearing, the trial judge again denied bail, supporting his denial by what the Court of Appeals has characterized as "a carefully reasoned and detailed opinion." The motion for bail by Bowers and Ward was thereupon renewed before the Court of Appeals. That court, in a *per curiam* opinion, denied the renewed motion, whereupon the petitioners again asked me to allow bail.

Both the lower courts have set forth the grounds for their denial. They have expressed themselves to be duly mindful of the controlling force of Rule 46 (a) (2), as amended. The issues that are raised here have been fully canvassed in the briefs filed by the petitioners and the Government. Both sides have addressed themselves to the proper scope of the amended Rule and its appropriate application to the specific circumstances of this prosecution.

It is common ground that the amended Rule 46 has made a decided change in the outlook on granting bail after conviction. The Government, as I have already indicated, accepts the statement in my memorandum of July 13, 1956, that the old Rule 46 (a) (2) has by the amendment "been greatly liberalized." Putting to one side its qualifications, I think the Government is right in saying that the granting of bail is called for more readily under the new standard than it was under the old concept of "substantial question." It is also right in indicating that the new Rule effectuates a shift from putting the burden on the convicted defendant to establish eligibility for bail, to requiring the Government to persuade the trial judge that the minimum standards for allowing bail have not been met. The authoritative interpretation of the amendment must, of course, await a decision by the Supreme Court. In the meantime, however, one cannot escape his individual responsibility in passing on a petition like this.

The Government commendably acknowledges that the new Rule has made an important change. The Rule expresses a general attitude, the significance of which is that inasmuch as an appeal from a conviction is a matter of right, the risk of incarceration for a conviction that may be upset is normally to be guarded against by allowing bail unless the appeal is so baseless as to deserve to be condemned as "frivolous" or is sought as a device for mere delay. The Government suggests, however, that there may be considerations other than frivolity or delay, which may conscientiously move a trial judge to deny bail without disloyalty to the amended Rule. I am bound to say that the Government is rightly cautious in suggesting the extent of the area of discretion that still remains under the amended Rule.

Elaboration of whatever occasions for discretion may remain had better be left to the specific occasions which may give rise to such claims. The present situation presents one consideration that suffices for disposition of this case. The granting of bail certainly presupposes confidence that a defendant will respond to the demands of justice. In fixing the amount of bail, Rule 46 (c) explicitly adverts to the trustworthiness of a defendant. The bail must be of an amount to "insure the presence of the defendant." Impliedly, the likelihood that bail within tolerable limits will not insure this justifies denial of bail. One of the reasons that led the District Court to deny bail to Bowers and Ward was "that there is considerable motivation for these defendants to flee the Court's jurisdiction and that they have ample means to accomplish this purpose." I read this to mean that the District Judge felt that the likelihood of flight was a danger not to be disregarded. I cannot reject this conclusion of the District Court because it was based on confidential probation reports. See *Williams* v. *New York*, 337 U. S. 241. Such a judgment is, to be sure, a prophecy but I cannot sit as the district judge and make my own. Presumably, this reason of the District Court in denying bail was one of the considerations included in the "reasons" for the action taken by the District Court which the Court of Appeals respected in not overruling "the exercise of sound judgment" by the District Court. On this ground, I must deny the petition.

Asking a Circuit Justice to grant bail pending appeal in the Court of Appeals, after denial by the two lower courts, presents a difficult dilemma. An error of principle in the denial of bail, an indisputable question of law, calls for correction, whether the matter comes before the whole Court, as in *Stack* v. *Boyle*, 342 U. S. 1, or before an appropriate Circuit Justice. But when it is a question of the application of duly recognized standards, and such application turns on what may fairly be

called "facts," or on a necessarily prophetic judgment like the trustworthiness of a convicted defendant, I do not conceive it to be the function of a Circuit Justice to exercise an independent judgment as though he were sitting in the district court. And yet, even where "facts" are involved, a standard may be recognized in principle but honored, however unconsciously, in the breach. I think the practical way out of this dilemma lies in the more effective administration of criminal justice and, more particularly, in an appropriate procedure for criminal appeals.

Nothing has disturbed me more during my years on the Court than the time span, in so many cases that come here, between the date of an indictment and the final appellate disposition of a conviction. Such untoward delays seem to me inimical to the fair and effective administration of the criminal law. I see no reason whatever why we in this country cannot be as expeditious in dealing with criminal appeals as is true of England. Applications for appeals are heard in the English Court of Criminal Appeal within eight weeks of conviction; in murder cases appeals "are generally before the Court not later than three weeks after the conviction." Lord Chief Justice Goddard, "The Working of the Court of Criminal Appeal," 2 J. Soc'y Public Teachers of Law 1, 3 (1952). An examination of the volume of reports of the Court of Criminal Appeal for the year 1954 reveals the following: Generally only two to three months elapsed between the entry of the judgment from which review was sought and the actual hearing of an appeal; the shortest period was one week, in a murder case; the longest period was five and one-half months. This is true of a court, it should be noted, that has something like 1200 applications annually coming before it, disposed of by judges who have considerable additional judicial duties. Conviction in this case was had nearly four months ago, and probably two months more will pass, unless I am misinformed, before the case may be heard on its merits. The indictment here was found more than three years ago and the appeal is not likely to be reached in less than six months after conviction.

I do not mean to imply criticism of any person or judge or court for what is a good illustration of the general leaden-footedness of criminal prosecutions. The fault lies with the habit of acquiescence in what I deem to be a reprehensible system. I duly note that in this case it was suggested to the petitioners by the Circuit Judge in denying their application for bail to apply for an order advancing the case for early argument, and on the part of the Government there was an offer toward facilitating the appeal, although its specific scope and effectiveness are controverted by the petitioners. To my mind, however, a more drastic procedure for the early disposition of a criminal appeal than agreement among the parties is required. The Government should, I believe, be the active mover for an early hearing, thus putting upon the convicted defendant the responsibility for setting forth sound reasons for postponing such a hearing. I am not able to understand why it should not become the settled practice for the Government to move, after an appeal is taken from a conviction, for the hearing of the appeal on the stenographic minutes at the earliest possible moment that a Court of Appeals can accommodate its calendar to the disposition of business that has first call, namely, a criminal appeal. This is especially desirable in a case where bail has been denied. The time to argue a case is when the various legal points, including the claim that there was not sufficient evidence to go to the jury, are fresh in the minds of counsel. I cannot but believe that it would, on the whole, also facilitate consideration by courts of appeals of criminal appeals to have the minutes of the trial before them and to be referred by counsel, fresh from combat, to the claims in controversy as they are supported or contradicted by the stenographic minutes. I am confident that all the courts of appeals would be responsive to such a demand for as speedy a disposition of criminal appeals as the interests of justice permit, including, of course, in the interests of justice, adequate preparation and due deliberation.

Motion denied.

■ *Readers of the* JOURNAL *will be interested in the following excerpt from the August 28 issue of the* New York Times, *which gives a revealing picture of the character of the current President of the Association.*

The Bar's "Top Sergeant"

■ If David Farrow Maxwell had pursued journalism and become by chance a city editor, he undoubtedly would have been the sort reporters love but call a "holy terror". He is red-haired, blue-eyed and as forceful in action or expression as the traditional picture of a top sergeant of the Marines. But after just enough newspaper work to pay his way through college, the youthful Maxwell became a Philadelphia lawyer. He is now the stern taskmaster, but the idol, associates say, of junior lawyers in a distinguished legal firm in that city.

For the next year, as President of the American Bar Association, he will direct an organization of nearly 100,000 members. Anyone who thinks he will not run the show would regard Casey Stengel as the bat boy for the Yankees.

The reason Mr. Maxwell can boss lawyers and make them like it is because they know that he always knows what he is doing. If he criticizes the work of younger colleagues in his office, he does it with a more profound knowledge of the law and a more experienced perception of the problems involved than they have. If he bangs a noisy gavel when legal groups become tangled in parliamentary intricacies, few make bold to challenge him because he is recognized as an authority on parliamentary procedure.

Mr. Maxwell might well have risen to be a city editor, or gone on to greater heights, had he stayed in

journalism. He was graduated from high school when he was 16 years old and got a job as a reporter on a Philadelphia newspaper. Reporters then were often paid space rates and his compensation was at the rate of $5 a column. The first week he earned $7.

Three months later, so capable and industrious was the "cub", that the city editor found it more expedident and less expensive to put him on salary at $25 a a week.

Through college and law school he continued to cover special assignments for Philadelphia papers. He kept his muscles agile by working as a brakeman on a railroad in the summer.

As did many American boys, he once toured the country in a Model T. In Washington State he ran out of money and shocked wheat in the vast fields of eastern Washington to earn funds to buy gas for the "Tin Lizzie" and hamburgers for himself.

The Model T then chugged up—and then down—the steep slopes of the Cascade Mountains. Mr. Maxwell and a college friend took time out to climb Mount Rainier, one of the most formidable peaks in America, without a guide.

These adventures did not detour him from the highway of education. He was graduated from the Wharton School of Business Administration at the University of Pennsylvania in 1921 and from the University of Pennsylvania Law School in 1924. At the Wharton School he was elected to Beta Gamma Sigma, honorary scholastic fraternity. At law school he served as editor of The Pennsylvania Law Review for two years.

He was admitted to the bar in 1924, and became associated with Edmonds, Obermayer & Rebmann. He became a partner in 1929 and now is the third ranking member of the firm.

Mr. Maxwell is as Philadelphian as scrapple for breakfast. He was born there on November 7, 1900, and always has lived there.

Nonetheless, he has seen more of the world than a good many persons have. He specializes in corporate law and the interests of his clients have taken him to India on a complicated tax case, to Spain and Japan to negotiate contracts in behalf of private corporations, to Venezuela in connection with a corporate claim and to Switzerland and Denmark on merchandising problems.

Mr. Maxwell married Emily Ogden Nelson of New York in 1925. He is very proud of three grandchildren, born to his daughter, Fairlie, and William H. Pasfield, a doctor of physical chemistry, employed by the du Pont company. He spends much of his leisure time with them in their home at Arden, Delaware.

His son, David O. Maxwell, seems destined to follow in his father's footsteps. The son was graduated from Yale in 1952 and Harvard Law School in 1955. Just now he is doing a hitch in the Navy. But he has been admitted to the Pennsylvania bar and when he finishes his service he will become associated with his father's firm.

He has served as a vestryman of Epiphany Protestant Episcopal Church of Germantown and vice president of the Kiwanis Club of Philadelphia.

He is a member of the Union League.

Contributory Negligence:

An Outmoded Defense That Should be Abolished

by Laurence H. Eldredge · *of the Pennsylvania Bar (Philadelphia)*

■ **Addressing the Pennsylvania Bar Association last June, Mr. Eldredge urged the abolition of the doctrine of contributory negligence as a complete defense in negligence cases. The doctrine is "shocking and immoral", Mr. Eldredge believes, and has long been outmoded. His solution: substitution of a rule of apportionment of damages.**

■ I am speaking today in support of the proposition that contributory negligence should not be a complete defense to a claim for negligently inflicted personal injuries or property damage, and that it is desirable to change the existing law by apportioning the damages in accordance with the percentage of fault of the respective parties. The view which I advocate has frequently been described as the doctrine of comparative negligence but it is more accurately described as a question of the apportionment of damages.

Preliminarily, I wish to make a general observation about the function of law. Dean Roscoe Pound pointed out many years ago that law is social engineering. Neither common-law rules nor statutes are ends in themselves. They are always means to the end of securing the best possible social adjustment of conflicting interests. It is the best interests of society which should be served by the promulgation of a common-law rule or the enactment of a statute. Any law should be a means to eliminate or reduce social friction. It is inevitable that when a common-law rule is first announced or a statute is enacted, it is designed to meet the then current needs of the community caused by then current conditions. It is a truism that changes in community conditions come about more rapidly than changes in our laws. In some cases the continued application of an old law in a community which has undergone extensive economic, industrial and social changes increases the very social friction which the law originally was designed to reduce.

The rule that contributory negligence is a complete defense is a product of the early nineteenth century. That century was one in which tort law did develop; and the law of negligence developed extensively, particularly in the last quarter of the century. However, it was also a century in which both English and American judges believed that there must be definite restrictions on tort liability in order to avoid liabilities which would hold back the growth of plants, factories, railroads and other industrial enterprises. There was no liability insurance. A few large tort judgments might bankrupt a growing business which the community needed.

In this atmosphere, the doctrine of contributory negligence as a complete defense was promulgated in 1809 by Lord Ellenborough in *Butterfield* v. *Forrester*[1]. Actually, Lord Kenyon had proclaimed it in a charge to the jury in 1799 in *Cruden* v. *Fentham*[2], but the jury had refused to accept it (as so many juries have ever since), and found a verdict for the plaintiff.

This far-reaching new doctrine was rather casually written into the English law in a few sentences, and was accepted by the Bench and Bar and the nation with scarcely any comment. It provided what was generally believed to be a needed limitation on tort liability under early nineteenth century conditions. As the century progressed and factories grew, the principal application of the doctrine was to master-and-servant cases. This rule, plus two other rules, *i.e.*, the fellow-servant doctrine and voluntary assumption of risk, greatly limited the tort liability of manufacturers and other employers to injured employees. The liability of manufacturers and contractors to third persons was re-

1. 11 East 60.
2. 2 Espinasse 685.

stricted by the rule that there was no tort liability in the absence of privity of contract. The nineteenth century was also the century in which, in most situations, there was no contribution among tortfeasors.

Contributory Negligence. . . *A Shocking Doctrine*

When you analyze the doctrine of contributory negligence as a complete defense, it is a shocking and immoral doctrine. It would have created an intolerable situation long before now except for two factors: (1) in many cases juries refuse to apply it, and (2) in recent years our appellate courts have shown an increasing reluctance to define contributory negligence as a matter of law. However, there still remains a considerable residuum of situations in which the issue of contributory negligence is decided by the court alone. In its principal application, the doctrine of contributory negligence provides that when two persons by their respective fault cause harm, one of them must pay for it. Which one pays is wholly dependent on who was lucky and who was unlucky. The outcome depends upon the spin of the wheel of chance, the roll of the dice of fate. For example, take the familiar, typical illustration of a right-angle intersection collision between two motorists, *A* and *B*. *A* is unlucky and suffers personal injuries, medical expenses and loss of income totalling $20,000. *B* is lucky and escapes with property damage of $200. The total damages are $20,200. Is it not revolting that $20,000 of that must be borne by *A* and only $200 by *B*? Would it not be equally revolting if the wheel had spun differently and the impact of the damages on *A* and *B* had been reversed? If, after the collision, one of the cars had mounted the sidewalk and damaged *C*, a pedestrian, in the amount of $20,200, that total damage would be divided between *A* and *B* under modern rules of contribution. If *A* and *B* must divide up the damages they jointly cause *C*, why shouldn't they divide up similarly the damages they cause each other?

Because the rule of contributory negligence is so shocking and unjust, England created the last-clear-chance rule to ameliorate it in 1842, in *Davies* v. *Mann*[3]. That rule adopted in some forty-five American states, was equally unjust because it also placed all the burden on one party but shifted the loss from the plaintiff to the defendant. It has frequently, with some reason, been called "the jackass rule".

At the beginning of the twentieth century, trespass cases between master and servant clogged the courts as motor vehicle accident cases clog the courts today. Between the first decade of the nineteenth century and the first decade of the twentieth century, such great changes had been wrought in industry, transportation and manufacturing that the felt needs of the times cried aloud for changes in our tort law. The doctrine of contributory negligence and its corollaries, voluntary assumption of risk and the fellow-servant rule, were swept completely out in the master-and-servant field by workmen's compensation acts. In 1916 Judge Cardozo decided *Macpherson* v. *Buick Motor Co.*[4], and today no vestiges of the nineteenth century limitation on the liability of manufacturers and contractors remain. Also in this century the rules concerning contribution among tortfeasors have undergone great change.

Inevitable Losses. . . *They Should Be Shared*

We are now in the year 1957. Look at the hazards of everyday life today. The annual motor vehicle toll, dreadful as it is, is only the grimmest example. Should not the burden of the losses which are inevitable in present-day society be shared, in proportion to their fault, by all those who cause this harm? Modern liability insurance has eliminated the catastrophic effect which one or several judgments could have had on a nineteenth century defendant, particularly on a manufacturer or a public utility, or the driver of the 150 horsepower equivalent of the 1809 horse and buggy.

In Pennsylvania we have already swept aside the nineteenth century limitations on an employer's liability to his servants. We have swept aside the manufacturer's and contractor's non-liability to third persons. *Curtin* v. *Somerset*[5] is of only historic interest. In addition, in adopting the Uniform Contribution Among Tortfeasors Act in 1951, we have adopted the theory that all the persons who wrongfully cause harm should share the cost.

Having adopted that theory, how can we any longer cling to this one remaining outmoded rule announced by Lord Ellenborough in 1809, particularly when it has been discarded in its birthplace and in practically all the English-speaking dominions? Apportionment of tort damages between plaintiff and defendant is now the law in practically all the western world except the United States, and it is the law, in certain situations, in many cases in the United States.

I opened this with a general observation about the function of law. I now make a second general observation. A law which is contrary to the settled convictions of the community is a bad law. It cannot be enforced. It breeds contempt for law in general and it breeds contempt for judges and lawyers. Witness the prohibition amendment!

The rule that contributory negligence is a complete defense is contrary to the settled convictions of the community. Recently I attended a three-day conference with the Committee on Torts of The American Law Institute. Experts on tort law were present from various parts of the United States. I took an informal poll of them and they were unanimously opposed to the rule of contributory negligence as a complete defense, and they unanimously favored an apportionment of damages. Laymen in the community are aghast when you tell them what the

3. 10 M. & W. 546.
4. 217 N. Y. 382.
5. 140 Pa. 70 (1891).

defense of contributory negligence means. Juries frequently feel so strongly that they ignore the charge of the court and their juror's oath in returning their verdicts. I believe that intelligent instructions on the apportionment of damages would produce fairer verdicts and much greater respect for the law stated in the charge. As one who is proud of our judicial system, I don't like to see jurors flout their oaths and figuratively thumb their noses at the robed judge who charges them on the law.

Indeed, the present Pennsylvania rule of contributory negligence is contrary to the settled convictions, not only of the western world outside the United States, but the settled convictions of most people in the United States, except for a powerful minority in some organized Bars and legislative lobbies. It is sad, but true, that much of the development of our law has happened in spite of, rather than because of, the work of bar associations. This Association has a great opportunity to assist in reforming our law concerning contributory negligence. The change is inevitable because the best interests of the community demand it. Nobody can hold back this needed reform more than temporarily. On the other hand, we can give it a great impetus by supporting a well-drawn statute providing for apportionment of damages.

The screams of anguish from those who are frightened by the thought of changing the status quo do not impress me. The argument that we shall have an increase in litigation leaves me cold. That argument would have stopped the development of tort liability in the mid-nineteenth century. It would have prevented the decision in *Macpherson* v. *Buick Motor Company*. The function of tort law is to provide compensation for all injured persons who deserve it, and it is the function of government to provide tribunals in which such compensation may be obtained, regardless of how many claims are involved.

Nor do I fear that the juries will not be able to fix the respective percentages of fault even in multi-party situations. The problem is no more difficult than the problems juries face in fixing the amount and present worth of possible future earnings in a death case, or the length of future disability where injuries still exist but are not permanent, or the value of pain and suffering, or the value of harm to reputation in a defamation case. The examples could be multiplied. In no case does the jury determine any of these questions with the precision of a mathematician, or an engineer with a slide rule. They do bring to bear a cross-section of the ideas of twelve men and women from different parts of the community, and, by and large, the results are sensible. When they are not, the court has power over an arbitrary verdict.

The protests that ruinous consequences will follow the adoption of a law apportioning the damages where there is contributory negligence have the familiar ring of all the protests which unsuccessfully opposed other extensions of tort liability during the past century.

Jurisdictions which have provided for the apportionment of damages in contributory negligence cases have not been overtaken by disaster. The statutes have not been repealed. Liability insurance companies continue to compete eagerly for business in fields where apportionment rules govern liability.

Forebodings of disaster were raised against workmen's compensation laws, occupational disease laws, and the decision in *Macpherson* v. *Buick*, to cite a few examples. Again and again experience has proved that the forebodings of disaster came from the tongues of false prophets. The only persons who face ruin in the future, and have been ruined in the past, are the maimed, crippled, uncompensated plaintiffs.[6]

Phillips Studio

Laurence H. Eldredge has had a varied career as lawyer, educator and author. He began as a reporter in Philadelphia, was admitted to the Pennsylvania Bar in 1927, and has taught at Temple, the University of Pennsylvania and Columbia. He is the author of several books on legal subjects.

6. The English common law was changed a decade ago by act of Parliament. After reading this manuscript, the Right Honorable Arthur L. Goodhart, Editor of the *Law Quarterly Review*, Professor of Jurisprudence at Oxford and Master of University College, wrote the following comment to me and I publish it with his express permission: "It seems to me astonishing that there should be any opposition to the change in the law which you advocate. Although at the time when the law was altered here in England there was some opposition to the amendment, all objections to it have now disappeared. The fear that there would be an inordinate increase in litigation has proved unfounded. Parties are much more ready to reach a reasonable settlement as they know that the answer is no longer 'all or nothing'. In other words, if the law is reasonable it is probable that litigants will also act in a reasonable manner. I am particularly interested in this question as I helped to write the report on which the change in the law was based."

A Warning:

Was It Justified?

By S. Bruce Jones • *of the Virginia Bar (Bristol)*

▪ **The warning of which Mr. Jones writes is from Jefferson's Autobiography: " . . . how can we expect impartial decision between the General government, of which they [the federal judges] are themselves so eminent a part, and an individual State, from which they have nothing to hope or fear?" It is Mr. Jones' thesis that, in recent years, the decisions of the Supreme Court have indeed begun to undermine the rights of the states and consolidate all power in the hands of the Federal Government at Washington.**

▪ The purpose of this brief and inadequate article is to demonstrate by reference to only a few of the many cases available that, although the federal courts have abandoned *stare decisis* on other vital issues, they have rigidly adhered to *Marbury* v. *Madison* and extended the doctrine of that case beyond its original scope to the point of penetrating into the fields of legislation and of amendment of the Federal Constitution. The tendency is toward the centralization of powers in the Federal Government and the states are being reduced to the status of mere provinces. In this process the Constitution itself is being violated. The ultimate result can be nothing less than loss of state control of matters of local concern, the destruction of our dual system of government and the surrender of individual liberties to a remote and unwieldy bureaucracy centered in Washington. In the hands of a more competent author the argument could be made very devastating indeed.

Jefferson has written: "Laws are made for men of ordinary understanding, and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought in metaphysical subtleties, which may make anything mean everything or nothing, at pleasure." (Jefferson to William Johnson, June 12, 1823.)

"It is not enough that honest men are appointed Judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence. To this bias add that of the *esprit de corps,* of their peculiar maxim and creed, that 'it is the office of a good Judge to enlarge his jurisdiction,' and the absence of responsibility; and how can we expect impartial decision between the General government, of which they are themselves so eminent a part, and an individual State, from which they have nothing to hope or fear? We have seen, too, that contrary to all correct example, they are in the habit of going out of the question before them, to throw an anchor ahead, and grapple further hold for future advances of power. They are then, in fact, the corps of sappers and miners, steadily working to undermine the independent rights of the states, and to consolidate all power in the hands of that government in which they have so important a freehold estate." (Jefferson, *Autobiography,* 1821).

With his court-packing purpose in mind, Franklin D. Roosevelt, on March 9, 1937, said: "The court in addition to the proper use of its judicial functions has improperly set itself up as a third house of congress—a super-legislature, as one of the justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there."

The full extent to which Jefferson's warning has been justified can be determined only by exhaustive research. The reports are filled with dozens of examples that are common knowledge among all lawyers. Some idea of how the "ordinary rules of common sense" have been abandoned and the Constitution may be made to "mean everything or nothing, at pleasure" can be reached by a brief comparison of the provisions

of the commerce clause with the results attained by a few of the decisions of our Supreme Court.

The Commerce Clause . . . *Then and Now*

The Commerce Clause itself provides "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States". Amendment X reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively or to the people". Concerning this latter provision Jefferson wrote: "The states supposed by their tenth amendment they had secured themselves against constructive powers" (Jefferson to William Johnson, June 12, 1823).

Although by its express provisions the power granted to Congress is only "to regulate commerce" the Supreme Court has held that Congress has the power to regulate the manufacture and production of goods before they reach the stage of commerce and to prohibit their shipment in interstate commerce unless manufactured in accordance with wages and hours fixed by Congress. (*U. S.* v. *Darby*, 312 U. S. 100, 61 S. Ct. 451, 85 L. ed. 609, 132 A.L.R. 1430) By so holding the Court reversed many of its former decisions.

In another case it held that Congress could extend "federal regulation to production not intended for commerce, but wholly for consumption on the farm"—in other words, wheat that was raised by a farmer on his own farm and entirely consumed on the farm was held to be subject to regulation as interstate commerce, and the farmer who grew it only for consumption on his own farm was subjected to a penalty. *Wickard* v. *Filburn*, 317 U. S. 111, 63 S. Ct. 82. Doubtless this case served as the basis for the following incident reported in the press:

> Down in Alabama there is a filling station run by Joe Killian. Joe thought it would pretty up his station if he grew a bit of cotton on it.
>
> Besides, he thought a lot of Yanks, on driving South to hole up for the winter, probably never saw cotton close up, and might stop to look at his, and maybe buy a tankful of gas. It looked to Joe like a swell idea.
>
> But then the roof fell in. An army of bureaucrats landed on Joe. He had never thought he had to get an "allotment" to grow a bit of cotton to look at.
>
> The fact that his cotton never entered the market made no difference. Joe had to pay a fine for making his station look fine.
>
> It was a fine business all round. Joe's fine was $6.37. The taxpayers' fine was much more because the bureaucrats probably spent three or four hundred bucks to collect six.

After holding in one case, *Schechter Poultry Corporation* v. U.S., 295 U.S. 495, 55 S. Ct. 837, 79 L. ed. 1570, 97 A.L.R. 947 (1935), that the commerce clause did not authorize the assertion of federal power with respect to hours and wages of employees engaged in the processing of commodities which had come to rest after interstate transportation, and after holding in another case, *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 56 S. Ct. 855, 80 L. ed. 1160 (1936), that Congress had no power then to regulate labor relations in respect to commodities *before* interstate commerce has begun, the Supreme Court by a series of decisions of a divided court completely reversed its position. In subsequent decisions the Court adopted or accepted a vague phraseology that changed the entire concept of interstate commerce and thereby extended the control by Congress over (1) articles destined for commerce (2) articles that came to rest after interstate shipment (3) the manufacture of such articles and (4) the relation of employers and employees engaged in their manufacture.

Thus in a five-to-four decision the validity of the National Labor Relations Act was sustained in a case wherein an employer was charged with discriminating against union members and coercing and intimidating its employees in their efforts to organize a union in a plant manufacturing iron and steel already received from and to be shipped later to points in various states. The case turned on the clause "affecting commerce" which was defined by the act as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce", *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615 (1937). By thus extending "commerce" to mean production before and after entering interstate commerce but which "affects the flow of commerce" the Court held that Congress had a power which theretofore the courts had held it did not have. The practical effect is to give to Congress the power to regulate labor relations and hours of employment of all persons in all industries whose products come or go across state lines and to usher in a new era for business, labor and government.

In a series of cases over a long period the insurance companies had undertaken to extricate themselves from state supervision and control by asserting that they were engaged in interstate commerce. In each instance the insurance companies lost and the doctrine was established that insurance is not commerce. *Paul* v. *Virginia*, 8 Wall. 168 (1869); *New York Life Insurance Company* v. *Deer Lodge*, 231 U.S. 494, 58 L. ed. 332, *New York Life Insurance Co.* v. *Cravens*, 178 U.S. 389, 20 S. Ct. 962, 44 L. ed. 1116 (1900); *Bothwell* v. *Buckbee-Mears Company*, 275 U.S. 274, 48 S. Ct. 124 (1927). However, the Supreme Court overruled this "unequivocal line of authorities reaching over many years" and held that the insurance business is commerce and may be regulated by Congress. A former court had said that to reverse this line of cases, "would require us to promulgate a new rule of constitutional inhibition upon the states, and which

would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision". This vesting of the power to regulate the insurance business in Congress, and the consequent loss of regulation by the states if and when Congress should exercise such power, was effected by the decision in the case of *United States* v. *Southeastern Underwriters Association,* 322 U.S. 533, 64 S. Ct. 1162, decided in 1944. Fortunately for the states the good sense of Congress came to the rescue and it immediately (in March, 1945) passed an act which provided "The business of insurance and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business. No act of Congress impair or supersede, any law enacted shall be construed to invalidate, by any state for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business, unless such act specifically relates to the business of insurance" with the proviso that the Sherman, Clayton and Federal Trade Commission Acts shall be applicable to the business of insurance to the extent that such business is not regulated by state law (U.S. Code Annotated, Title 15, §1012). But the fact remains that under this holding Congress still has the power to oust the system of state regulation and take over at any time.

The Fourteenth Amendment: *A Contrast to the First Ten*

Perhaps the most interesting reading to be found in the opinions surrounds the Fourteenth Amendment and the problems to which it has been applied. Forced upon the states by occupying troops and carpet-bagger legislatures, the provision which wiped out the savings of those who had invested in bonds of the states and the Confederacy produced just that effect and is no longer of any application, but Section 1 of the amendment has remained very much alive. It stands out in bold contrast to the first ten amendments. They were limitations on the Federal Government—this is a limitation upon the states.

It is elementary that the first ten amendments, popularly and erroneously called the Bill of Rights, were designed "As a restriction on the exercise of powers by the United States or by federal tribunals and agencies, but did not impose any restraint upon a state tribunal or agency", *Twining* v. *New Jersey,* 211 U.S. 78, 53 L. ed. 97, 114 (1908).

The Federal Government, therefore, had a double limitation upon its powers. The first limitation is that it is a government of delegated and not of inherent powers and this fact is spelled out in plain words by the Tenth Amendment which provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people. The other limitations on federal power were specified in the nine preceding amendments.

The state governments were and are governments whose powers are inherent and were not delegated to them. When the states adopted the Federal Constitution they and their citizens created the Federal Government and by that instrument gave to it all the powers enumerated in the Constitution and expressly reserved to the states or to the people all powers not so delegated. The inherent powers of some of the state governments had been previously limited by a Bill of Rights embodied in their respective constitutions by their own citizens who were the ultimate repositories of their power and sovereignty.

Such, in general, was the status of the respective powers of the state and federal governments until the adoption of the Fourteenth Amendment. Upon the adoption of that amendment the further limitation was imposed upon the states by the provision that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

S. Bruce Jones, since graduation from the University of Virginia in 1919, has been engaged in general civil practice in Virginia with brief time out for occasional legislative and judicial positions.

Up to this point in our development the first ten amendments to the Federal Constitution were regarded as limitations upon power of the Federal Government, *Twining* v. *New Jersey, supra,* and were in no sense limitations on the powers of the states. The argument is now being advanced that provisions previously construed as only limitations of power on the Federal Government are now by virtue of the Fourteenth Amendment also limitations on the state governments and that this result has been attained by the surrender of powers by the states when they adopted the Fourteenth Amendment. Two dissenting justices in *Adamson* v. *California,* 332 U.S. 46, 67 S. Ct. 1672 (1947), agreed "That the specific *guarantees* of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment". Apparently these dissenters now regard the *limitations* as *guarantees.* The net result of this doctrine if followed to its logical conclusion would be to

endow the Supreme Court of the United States with final supervision over all state supreme court decisions wherein any provision of the ten amendments is violated by a state government, rather than by the Federal Government as was originally intended.

Even without accepting the doctrine that the Bill of Rights has been incorporated into the Fourteenth Amendment, the Supreme Court has extended the amendment to include supervision of the state courts and their handling of matters heretofore exclusively within the province of the states. Thus in *Naim* v. *Naim,* 350 U.S. 891, 76 S. Ct. 151 (1955), it undertook to vacate a final decision by the Supreme Court of Appeals of Virginia which had held invalid the marriage of a white woman to a Chinese man. It then remanded the case to the Supreme Court of Appeals of Virginia in order that the case might be returned to the circuit court for action not inconsistent with the opinion of the U.S. Supreme Court. The Virginia court met the situation without equivocation. When this order was received it held, *per curiam,* that there is no provision in Virginia law by which it could send a case back to the circuit court to be reopened. The Supreme Court of Appeals of Virginia stated: "The decree of the trial court and the decree of this court affirming it have become final so far as these courts are concerned". *Naim* v. *Naim,* 90 S.E. 2d 849 (1956).

Again, on April 24, 1956, the U.S. Supreme Court in a five-to-four decision held that an indigent defendant in a non-capital case should be furnished without cost a transcript of the record in the state court and that since the State of Illinois had not done this he had been deprived of due process of law, although apparently a narrative bill of exceptions was available. The rules of court and the statutes of the sovereign State of Illinois are thus struck down by this "interpretation" of the Fourteenth Amendment.

It is submitted that "the maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the Federal Constitution" and that the Supreme Court of the United States "has no more important function than that which devolves upon it the obligation to observe inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution".

> In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County* v. *Oregon,* 7 Wall. 71, 76, 19 L. ed. 101. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. [Justice Day in *Hammer* v. *Dagenhart,* 247 U.S. 251, 275, 38 S. Ct. 529, 532 (1918).]

State or Federal . . . *Who Decides Which?*

But there still remains the problem of who decides whether a power remains in the states or whether it has been granted by them to the Federal Government. For a long time it has been well settled by history and judicial decision that the specific powers granted to the Federal Government and their extent and scope are to be determined by the central government through its judicial department and that the states have to accept their decision. The states and their citizens had created a central government and had endowed that government with certain enumerated and specific powers. Without realizing it at the time they had granted to one department of their new creature the authority to decide what powers had been granted to it and what powers still remained in the states. They had created an agency and had given that agency the exclusive say-so as to the extent of its own powers. Such was the practical effect of the opinion in *Marbury* v. *Madison,* which Jefferson branded as *obiter dicta.*

Yet the earlier federal courts respected our dual system of government and had the integrity to say that the Union is indissoluble and the states indestructible. Time and again as occasion arose our earlier courts "maintained the authority of the States over matters purely local as equally essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to it".

In recent years the extension of federal powers by construction has accelerated and attained the practical effect of amending the Constitution and giving the Federal Government powers it never had and were never contemplated and taking away from the states powers they have always had. "This [forced construction of the Constitution] is even now the canker that is slowly but surely eating away the reserved rights of the States and sapping their powers. If the process be not checked, the time must certainly come when the Sovereign States will be nothing more than mere municipal corporations with only such powers left them as the federal government may choose to allow." Minor, *Notes on Government and States Rights,* 1913.

Of the present extension of federal powers by construction it has been well said that "Nothing is more insidious, nothing more dangerous."

> If a power is one reserved by the States and, after long and patient trial and experiment, the States prove incompetent to exercise it properly, and it is essential that it be so exercised, then let the power be transferred to the federal government by amendment to the Constitution. If the necessity is not great enough and

(Continued on page 92)

Books for Lawyers

THE RIGHT TO COUNSEL IN AMERICAN COURTS. *By William M. Beaney. Ann Arbor: University of Michigan Press. 1955. $4.50. Pages xi, 268.*

Considering the present increased interest by the organized Bar in providing representation for indigent defendants, coupled with recent and very significant decisions of the Supreme Court, *The Right to Counsel* is a publication so timely and pertinent that it appears to have been especially prepared for this period.

The chief value of the book lies in its logical presentation, the completeness, accuracy of its citations and the general readability of the text. Professor Beaney neither succumbs to the temptation of flag-waving, nor does he resort to the cold, academic approach. Even though the volume is based upon extensive legal research and deals with legal philosophy, the style of writing is easy and free. The material is carefully outlined and presented in logical sequence with summary conclusions at the end of each chapter. A bibliography, table of cases and a complete index (even to footnotes) are provided.

The author proceeds from a discussion of the role of counsel under English and early American law to the interpretations the federal and state courts have placed on the Sixteenth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments, explaining, comparing and quoting to round out a full brief on the right of counsel. He then turns to the practice in the courts today, spending time on each of the plans existing to provide representation to the indigent: assigned by the Court—compensated or unpaid—the public, and the voluntary defender.

Sharp, objective, well-documented discussions are provided to shed light on such perplexing problems as: Does the United States Constitution guarantee that counsel will be furnished the indigent defendant in state and federal courts? Is there a difference if the charge involves offenses of less degree than capital? Can there be a "fair trial" if there is no counsel? Do the provisions of the Sixth Amendment apply to a state? What constitutes valid waiver of counsel? How can counsel be most effectively provided?

One weakness—a criticism that could be made of almost any study that requires lengthy research—is that by the time the book is published, many of the data are no longer current. This applies more particularly to the chapter on "Right to Counsel in Practice." He relies chiefly on a previous report (*Legal Aid in the United States* by Emery A. Brownell) and has given little fresh or new material.

With the exception of two charts —one on references of state constitutions to counsel and one on statutory provisions, there is no appended statistical detail. This defect is annoying when one is looking for specific information on a state. (For instance, in how many jurisdictions is counsel appointed *before* arraignment?) These are minor shortcomings, however, and do not obscure the main thesis which is adequately and persuasively developed.

In discussing the "fair trial" doctrine, Dr. Beaney makes this significant observation: "To say that trials without counsel can be fair is to assume either that the defense which counsel might have presented would not have changed the result of the case or that in certain types of cases counsel serves no useful functions. The first assumption is hindsight and unprovable. The second, if true, would convict a portion of the Bar of taking money under false pretenses in all those "simple" cases when counsel accepts a retainer but apparently cannot influence the result. We cannot with justice, keep the existing "fight" theory of criminal law and force the indigent defendants to fight alone. If our vaunted claim of "equal justice under law" is to be more than an idle pretense, the right to have counsel must be extended in practice to all persons accused of crime.

JUNIUS L. ALLISON

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FROM EVIDENCE TO PROOF. *By Marshall Houts. Springfield, Illinois: Charles C. Thomas. 1956. $7.50. Pages 396.*

Unlike a Wigmore treatise, this book assumes that the evidence is admissible, and as the title implies, the author proceeds with a practical analysis of the real probative value of various types of evidence. In other words, when the lay witnesses and the experts have testified to a set of facts, do their statements and opinions prove the points at issue?

The author's background qualifies him to draw reliable conclusions on the evidential value of all types of proof. In addition to practicing law and serving on the bench, Marshall Houts has been a Special Agent of the FBI and of the OSS, and at present is associated with the team of experts headed by the famous murder-mystery lawyer and novelist, Erle Stanley Gardner. As General Counsel for Gardner's "Court of Last Resort", it is under Houts' guidance that persons wrongfully convicted of crime are cleared and freed, on occasions some years later, where the evidence is shown to have led to a miscarriage of justice by a conviction of the wrong person. The purpose of this book is not to espouse this cause, however, but is a valuable contribution to the busy lawyer who

is constantly confronted with the specific types of evidence discussed and needs help in the way of a ready reference and a short-cut to the proper answer. Proof used in criminal trials is only one phase of the work. In addition, the author discusses briefly the common errors honestly committed by the eyewitness in his testimony, the examination of questioned documents, distorted photographs, traffic accident cases, mental competency, accountants' testimony in tax cases and stockholders suits, and the evaluation of physical evidence.

Most trial work calls for the employment of experts in some field, and the lawyers must of necessity know something of the subjects to examine intelligently. Usually time does not permit thorough study or enough background to read and understand the technical bibliography on the subject. Oftentimes, the particular type of expert is not available to counsel to educate him on the question. This book helps the busy lawyer by concisely summarizing the expert knowledge on every conceivable specific subject useful in the trial of a lawsuit. General medical testimony is wisely omitted, being a field in itself. For instance, the lawyer suspects a forgery and consults his local bankers as handwriting experts. Their opinions may be admissible in evidence and thoroughly honest, but grossly mistaken for reasons set forth. Some tests for blood stains or blood groupings will eliminate suspects with absolute certainty, but certain tests do not serve as proper identification. How accurate are the tables on the length of skid marks as indicating the speed of the automobile? The latest scientific knowledge is condensed in language a layman can understand and the reasons are set forth clearly. Thirty-three short chapters make the reading easy and contain a veritable storehouse of practical scientific knowledge. The author exposes the fallacies of the "law of probability", heavily relied on by some so-called experts, and sometimes confused with positive proof by juries. Lawyers are prone to favor the narratives of lay witnesses and to overlook the superiority of uncontrovertible physical evidence. Scientific knowledge is extremely valuable in competent hands, but can be badly abused by the testimony of pseudo-experts.

The book is a bread-and-butter item in helping counsel to cross-examine alleged experts, to separate the real experts from the incompetents and charlatans and to clarify his thinking in the step from evidence to proof. To obtain the same information, one would have to read volumes of technical lore and then call in an expert to interpret it. A lawyer engaged in trial work should peruse the chapter titles, read those that attract his interest, and either have the book on his shelf of available for future reference.

HOWARD COCKRILL

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CONGRESSIONAL POLITICS OF THE SECOND WORLD WAR.

By Roland Young. New York: Columbia University Press. 1956. $4.50. Pages 281.

Although many events of the years of World War II should still be fresh in our minds, most of us do not think of them now in order of time or in relation to other relevant matters or events. This book places in proper perspective with the progress of the war, activities and policy developments in the United States Congress. It impressively shows how public opinion in a great republic, operating through the elected representatives of the people, constantly influences national policies, both foreign and domestic, even during all-out world war.

The book covers a wide scope of activities and events. The author says: "An attempt has been made to organize the considerable material around three major questions. (1) What major external events influenced Congress? These events ran the gamut from the bombing of Pearl Harbor to demands of civilians for new tires. (2) What was the reaction in Congress to these events? Sometimes Congress would study the issue and enact legislation; sometimes it would create an investigating committee; sometimes it would be inordinately passive. (3) What part was played by procedures, partisan groups, and political ideas in making the requisite decisions? The response within Congress was continually determined by the organization which existed and the procedures which had to be followed. Partisanship played a greater part in determining some types of issues than in determining others. The political ideas governing decisions were drawn from many sources, but of course during the war the concepts of fairness and justice were always compelling."

The principal matters covered are conversion of the economy to a wartime basis and control over war policy and executive war agencies to which there was necessarily great delegation of power, manpower and labor policy—work or fight, price controls, taxation, military strategy and alliances, new foreign policy and reconversion to peace, with separate chapters on each. It is pointed out that the rivalry prevailing between the two political parties continued during the war with Congress retaining its partisan organizational base and that there was no suspension of elections as in Great Britain. The author says: "It was necessary to permit a type of partisanship which would allow the parties to survive the war, for political parties were part of our free institutions for which the war was being fought." As also shown, the viewpoints and interests of different states and various economic groups (farmers, labor, business) were vigorously presented and debated in Congress. It is a striking demonstration of the vitality of our institutions that all this could be done during total world war.

The author makes the following comment concerning possible effects of the war on the future of our government.

> The relative power of institutions and the relationship among them can-

not be permanently fixed by constitutional provisions alone. The function of the electoral college, for instance, has been changed without altering the written constitutional base, and in other times and eras one may note the continuity of institutions after their effective power has ebbed. The Roman Senate continued on into the Empire, although with diminished power, and monarchies which were once powerful have been circumscribed by law and custom. It may therefore be pertinent to inquire whether the extensive authority exercised by government agencies during the war altered the relationship between Congress and the Executive branch, although any final answer is premature, inasmuch as established trends may not be immediately discernible.

Whatever the final verdict, Congress made serious attempts to retain and assert its authority. At the end of the war strong voices demanded that "Congress regain its powers," as the phrase went, and this move had the obvious support of those who wished to remove government controls over the economy. In due time, Congress repealed the emergency grants of power, abolished the war agencies and adminstrative courts, disassembled the great military machine, and reestablished a free economy. From the legal point of view, Congress may be said to have "regained" the delegated powers and reestablished the constitutional position it enjoyed before the war. It is less demonstrable, however, that an equilibrium of power was reestablished, a doubt which is sustained by the relative positions of strength of the President and the military establishment and by the continued existence of unsolved problems which Congress must face in any future crisis. These relate to the control of delegated power, the allocation of resources, the determination of fiscal policy, and the making of foreign and military commitments.

It seems obvious that the authority of the President was increased during the war, not only as a result of power delegated to him but also as a result of the increasingly significant position of the United States in world affairs. Moreover, the bureaucracy in the White House itself has been expanded and centralized so that the President has closer control over significant governmental decisions. The authority of the military establishment has also increased, and it has been given new responsibilities by virtue of the expanding military commitments and by a series of regional alliances. The voice of military officials is also important in domestic issues affecting defense and in foreign issues.

The increased power of the Executive branch of the government is directly related to the question of how men, money, and material are to be allocated, and these are decisions lying at the heart of the political process. In time of war, with many aspects of society controlled by government regulation, centripetal trends develop which make it attractive to centralize control over these decisions in the Executive agencies. No one would argue that it would be desirable for Congress itself to make all decisions of whatever magnitude on allocating resources, but one can argue, I believe, that it would be desirable that basic policy in these areas be laid down by law and that Congress make the decisions on the political adjustments required. One may well ask whether it would not have been more salutary, for instance, to let Congress adjust the respective demands of agriculture and labor than to tolerate a situation where it appeared that the President was the defender of one set of interests and Congress of another; or whether it would not have been better if Congress had established a legal basis for the war agencies, established a labor program, determined policy on subsidies, and debated the nature of our postwar military commitments.

Certainly the preservation of our form of government, as a government of laws and not a government of men, depends upon a strong and vigilant Congress maintained as an independent branch of our constitutional organization. This book, by showing the experience of the last war, points out some of the problems which may face Congress in the future. It is fervently to be hoped that they will not have to be tested by total atomic war.

LAURANCE M. HYDE
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THE TRUTH ABOUT DIVORCE. *By Morris Ploscowe, New York: Hawthorn Books, Inc. 1955. $4.95. Pages 315.*

The law of marriage exists for the orderly regulation of that institution which is meant to provide affectional and sexual satisfactions, the procreation, rearing and education of children, and the gaining, distribution and spending of the wealth of the family under a common home shelter.

Divorce, in terminating the marriage tie, brings dislocations in every one of these elements. What, then, should be the law of divorce? How may we save as many marriages as possible? And if a divorce must be, how may we regulate it so as to cause the least dislocation and trouble?

Morris Ploscowe, who is judge, lawyer, sociologist and philosopher, in attempting to answer these questions, has given us a book of wisdom and delight. His writing is vivid. It is studded with stories from real life. The reader soon discovers that here is a man, who has not only practiced law and decided cases, but has shared in his feeling and personality the tragedy of a thousand divorces.

The book should be read by every adult person in America. The lawyer will find the important cases discussed with new light and broader perspective. (Incidentally, it is regrettable that the book contains no table of cases.) Here is *Andrews* v. *Andrews, Haddock* v. *Haddock, Williams* v. *North Carolina, Coe, Sherrer, Estin, Esenwein,* and *Johnson* v. *Muelberger* and even *Alton* and *Granville-Smith.* An appendix gives a synopsis of the grounds for divorce, the residence requirements and restrictions on remarriage in all states and territories. The teacher will find an evaluation of both legal and sociological literature. The legislator will be brought face to face with his failures and a plan for beginning again with new tools. And every man who is married or ever hopes to be, will find the law of marriage and divorce clothed with the flesh of life as it is lived in contemporary America.

The author surveys the problem, gives us statistics on the increasing divorce rate, distinguishes the real reasons for divorce from the legal grounds (most of the latter are synthetic), studies the alternatives and

analyzes the strategy of the defenses. An illuminating chapter covers the "quickies" in the tourist shopping centers of Nevada, Florida and Mexico and their oft surprising consequences, another the economic problem of alimony and support and still another the custody of children.

A final chapter on reform in our divorce law is a keynote to the purpose of the book. One of the problems of the law of divorce is its diversity. Divorce law is state law and forty-eight states have forty-eight laws. It will come as no surprise to the law man, but it may to the layman that the last fifty years has witnessed the repeated failures of the only two possible means of unification—universal adoption of a uniform law and federalization of the law of divorce. Uniform laws suggested by the National Conference of Commissioners on Uniform State Laws and by others have failed of passage. Repeated attempts to amend the Constitution of the United States to give Congress power to legislate have ended in similar failure. Faced with this history, our author has no corrective remedy. He is willing to accept and try still to live with the "quickie" divorce "which is one of the penalties we pay for states' rights in the field of marriage and divorce" (pages 263-264). Even though politically realistic, this conclusion is disappointing. Our Constitutional Fathers, at a time when divorce was almost nonexistent, decreed that divorce was a matter of state law. Today, when states' rights have ended in the muddle and frustration of the divorce jungle are we to accept, without hope, the cross thus saddled upon us by the Founding Fathers? If so, verily the American people have lost the art of constitutional reform, have lost the power, which once they possessed, to create an orderly solution of a fundamental problem.

Accepting the fact, then, that we must proceed to improve our divorce law by the glacier-like process of state by state legislation, Judge Ploscowe has something very important to tell us. He recommends that a rational reform of the divorce law should be based on the following objectives:

1. The abandonment of the traditional litigious punishment for guilt.

2. The substitution therefor of a diagnostic-therapeutic technique which will lay bare the underlying causes of family conflict and which can take basic measures toward their correction and elimination.

3. The requirement that a judicial separation shall precede every divorce.

4. The provision that continued separation for a period fixed by law shall justify a court in granting a divorce.

5. The organization in each community of a unified family court adequately equipped to deal with all problems of the family including divorce.

This is indeed important. It entails the attempt to save from liquidation every viable marriage, the elimination of traditional "causes" and "defenses", the abandonment of the adversary procedure and the marshalling, in every community, of the aids and techniques of the marriage counsellor, psychologist, psychiatrist and physician.

It is the hope of this reviewer that more and more people, through a careful reading of this book, will come to know and accept the diagnostic-therapeutic approach and will insist that their representatives in the legislatures write it upon the statute book in every state.

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LEGAL CONTROL OF THE PRESS. *Third Edition. By Frank Thayer, Professor of Journalism and Lecturer on Law of the Press, School of Journalism, University of Wisconsin. Brooklyn: The Foundation Press, Inc. 1956. $6.00. Pages 749.*

This book represents an attempt by the author to write a definitive work on legal control of the press, with specific reference, as he says, to "Potential or Actual Controls that Affect the Press, particularly Libel, Privacy, Contempt, Copyright, Regulation of Advertising and Postal Laws". Because of the relatively recent advent of radio and television, there are brief references to broadcast media defamation. The presentation of the study is based upon the experience of the author in his classroom and seminar work in the School of Journalism at the University of Wisconsin.

The aim of the author, as stated his preface, is to make difficult problems understandable. In part he has accomplished this aim; in part he has failed. To illustrate the latter point, unless one is familiar with the opinions of the Supreme Court of the United States in the *Nye, Bridges, Pennekamp, Craig* and *Baltimore Radio Show* cases, one would gain the impression that courts in the United States still possess the power to punish as constructive contempt writings which they think have a tendency to obstruct the administration of justice. Obviously, the author believes they should possess such power. In expressing his opinion as to what the law should be, the author occasionally departs from his stated purpose of making "difficult problems understandable".

The treatment of control of the press through the assertion of powers, some directly conferred by legislation and some implied through administration, by the innumerable federal agencies which have been created during recent years is sketchy to say the least. Possibly, the field is too controversial at the moment.

Notwithstanding the foregoing criticism, the volume should prove of value to students of journalism, for whom it is intended. It covers a lot of territory, some of it extremely well. Particularly valuable are the chapters dealing with the historical background of efforts to control the press and those relating to the ever-lurking danger of libel actions. Excerpts from many of the cited cases contain some fascinating reading.

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THE PROOF OF GUILT. *By Glanville Williams. London: Stevens & Sons Limited. 1955. Pages viii. 294.*

The Proof of Guilt consists of interesting and illuminating lectures by an English barrister and Fellow of Jesus College, Cambridge, on a number of selected aspects of the administration of criminal justice in England. Several of the topics discussed would be of interest to an American student of the law, as they involve matters that have received considerable discussion in this country in recent years.

One of these subjects is the privilege against self-incrimination. The author logically draws a line of distinction, that is generally overlooked, between the right of a witness to decline to answer a question on the ground that the answer might incriminate him and the right of a defendant not to have any questions directed to him at all. The author does not think well of this right of a defendant and expresses a preference for the French practice, which permits the accused to be questioned in open court, with no penalty for refusal to answer except, of course, the risk of an unfavorable inference. The author argues cogently in support of his position, although, no doubt, he would admit that the right of a defendant in a criminal case not to have any questions directed to him, is so much a part of the warp-and-woof of Anglo-American jurisprudence that it would be futile to endeavor to abrogate it, even if such action were desirable, as to which there may be a considerable difference of opinion. The author points, however, to the English rule, which permits the trial judge to comment on the failure of the accused to testify. This compromise, as the author calls it, seems to have a great deal of merit, for it seems more realistic than the doctrine prevailing in the federal courts and in most of the states, under which the defendant is entitled to an instruction to the jury that no adverse inference may be drawn from his failure to take the stand. This reviewer has sometimes wondered to what extent this admonition weighs with the jury and whether the jury is able to perform such psychological acrobatics.

The author cogently calls attention to the unreliable character of identification by eye witnesses. Yet in the popular mind direct evidence is deemed more impressive than circumstantial evidence, whereas the opposite is the fact.

Another interesting observation made by the author is that in recent years the English courts have done away with the instruction to the jury that the crime must be proved beyond a reasonable doubt. Instead the jury is directed that it must be satisfied of the defendant's guilt. The reason for this change is said to be that the phrase, "beyond a reasonable doubt" cannot be satisfactorily defined. The author expresses a lack of confidence in jury trials, although he recognizes that the majority view is to the contrary. Here this reviewer disagrees with the author. In this country, at least, the great majority of trial judges and trial lawyers, who try cases with juries from day to day, have a profound confidence in jury trials. Adherents of the opposite view are to be found only among those whose work does not bring them in constant contact with juries. It is significant that in spite of the views that he expresses, the author refers to the success of the jury system in England and attributes it to the right of the judge to sum up the evidence. Here he is on solid ground. Most federal judges will agree with him, for this right is preserved in the federal courts, as well as in a small minority of the states. As is well known, the American Bar Association, through its Section of Judicial Administration, has been urging the restoration to state judges of the power to instruct the jury orally and to comment on the facts and on the evidence. The author emphasizes that in England the percentage of jury trials, even in criminal cases, has gradually decreased in recent years as a result of the right of the defendant to waive a trial by jury.

The book is well written and discloses the results of thorough study and profound thought. It is recommended to all who are interested in the administration of criminal law.

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FUNDAMENTALS OF PRIVATE PENSIONS. *By Dan M. McGill. Homewood, Illinois: Richard D. Irwin, Inc. 1955. $4.50. Pages 211.*

PENSIONS: PROBLEMS AND TRENDS. *Edited by Dan M. McGill. Homewood, Illinois: Richard D. Irwin, Inc. 1955. $4.50. Pages 211.*

After a decade in which the growth of private pensions has been phenomenal, and with all indications pointing towards a continuation of that growth for the future, it is wholly appropriate that Professor Dan M. McGill, of the Wharton School of Finance and Commerce, University of Pennsylvania, should present these two works which will contribute so much to the knowledge and learning in this highly intricate but eminently practical field. While accurate statistics as to the extent of coverage are not available, it is estimated that there are in current operation over 20,000 private plans providing retirement funds for some twelve million employees. This coverage represents about one fifth of the working force of the nation. With such wide coverage and with further large areas yet to be reached, a very real service is rendered to the community through this contribution to the literature in the field.

The first of these volumes, *Fundamentals of Private Pensions,* addresses itself, as the title would indicate, to the basic principles of pension plans in private industry. This work is the outgrowth of research undertaken and sponsored by the Pension Research Council of the Wharton School. A better appreciation and understanding of private pensions and the forces contribut-

ing thereto is the goal of the Council, and this book is its initial publication.

Essentially, *Fundamentals of Private Pensions* is an introduction to the subject of pension planning; yet it constitutes more than that. It is a well-rounded textbook covering the significant features of pensions and the factors which enter into the "what" and "why" of retirement planning. In speaking of it as a textbook, I do not intend to class it as a manual for the drafting of pension trusts, but rather I have in mind a work containing analytical and discussion material on the principal considerations which bear upon the subject of private pensions.

For orientation and background into pensions, the book starts with an adequate description of the economic forces which have given rise to this phenomenon of our century. One of the major factors involved is the progressive aging of the population, as evidenced by the fact that during the last fifty years when the country's population doubled, the number of persons age 65 or over quadrupled. This factor, coupled with the general decline in employment opportunities for the aged, and accompanied by the apparent lessening of the ability of the working man (for whatever causes, be it heavy income taxes, relentless pressure to spend) to save for his "golden years", has produced the multitude of retirement plans, public and private, which we have witnessed in recent years. These factors, or pressures, show no signs of abating, and the number of plans and coverage may accordingly be expected to grow. With the Federal Security Program furnishing only a "floor of protection", or a minimum of old-age security, the morale and productivity of employees, the recent drive by labor units for expanded fringe benefits, and the tax subsidies accorded under the Federal Internal Revenue Code heightened by the war and postwar tax rates, all have combined to "encourage" industry to provide supplemental retirement benefits.

The basic features of pension plans are analyzed in some detail from the three vantage points: coverage, benefits and sources of funds. As to coverage, very few private plans provide for participation by all employees. The most common bases for exclusion from coverage are type of employment, class of compensation, size of compensation, duration of service and age of employee. While as a general rule, the Revenue Code permits the approval of plans which discriminate among employees on any one or more of the foregoing bases nevertheless the plan must not operate to favor any of the following classes of personnel: officers, stockholders, supervisors and highly compensated employees.

The second principal feature of pension plans is the benefit structure, which is, of course, the objective of pension planning. A full analysis is made of the various types of benefits, the benefit formulas in current use, the maximum and minimum limitations, the timing of payments and the vesting of benefits prior to retirement. Of particular interest is the discussion of integration of private plans with the Federal Old-Age Security Program. In order to avoid what is known as the "pyramiding of benefits" under the two concurrent systems, most employers have sought to adjust the benefits under their own plans so as to produce a co-ordinated and rational scale of benefits. Several methods for the achievement of such correlation have been developed which do not result in benefits discriminating unduly in favor of the highly paid employees; these are described by Professor McGill with much welcomed clarity.

The third major feature of pension plans is the source of financing, *i.e.*, whether the contributions shall come from the employer and employee jointly or from the employer alone. The principal arguments for and against employee contributions are summarized, although perhaps in this area more discussion of the factors involved might have been beneficial, for the problem is one which will often arise for serious consideration in the development of a pension system.

A full chapter is devoted to the various types of pension plans, which Professor McGill divides into three broad classes, insured plans, self-administered trusteed plans and combination plans, for the purpose of bringing out their principal characteristics, advantages and disadvantages. Another chapter treats the crucial subject of financing, covering the reasons and need for advance funding of benefits, together with the statutory limitations thereon imposed by the Revenue Code. Inherent in advance funding is the determination (or rather estimation) in advance of the cost of the pensions provided under the plan. The principal factors in this vital process are listed and analyzed. In turn, the various methods of advance funding now in general use are discussed, with illustrative plans developed on a comparable basis to show the fiscal impact of each.

In a final significant chapter, Professor McGill takes up the considerations which bear upon the employer's choice of the funding medium. The decision as to whether the services of an insurance company or a trust company should be used in the administration of a pension plan is one of the more difficult, yet important, problems confronting management in pension planning. The factors which should be taken into account in making the choice are more numerous than is commonly supposed, and the weight and implication to be assigned to each are open for argument. After a critical analysis, Professor McGill concludes that "no funding medium is inherently superior to all others". Whether or not one would agree with his impartial judgment on the matter, most would acknowledge that he has presented fully and fairly the issues for appraisal and application in individual cases.

Although written by a professor under the sponsorship of a research council, the work is not academic in

(Continued on page 96)

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE

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Attorneys . . . *government employment*

■ An important interpretation and application of Canon 36 has been given by the United States District Court for the Southern District of New York. Canon 36 provides that an attorney who has been employed by the Government "should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ".

In the instant case the United States, by a civil suit, was attempting to recover refunds from an oil company for alleged overcharges in sales financed under the Economic Co-operation Act. The Government moved to disqualify the firm representing the defendant because one of its partners, who was actively working on the case, had been employed by the Economic Co-operation Administration for more than two years during which the alleged overcharges were made. The attorney had worked in the Paris Office of the ECA but had not been connected with the activities giving rise to the suit.

The Government contended that the firm was barred because of the conflicting-interest rule of Canon 6 and the confidence provisions of Canon 37, in addition to Canon 36, but the Court thought that the United States Government was hardly the type of "client" encompassed by Canons 6 and 37. The Court felt, rather, that the case should be governed by the specific provisions of Canon 36, which covers former Government employment and makes no reference to a "client".

The Court conceded that it was well-established that the knowledge of one member of a law firm is imputed to the other members, but it refused to apply this rule to Government lawyers employed by an agency. It therefore rejected the Government's contention that the attorney had confidential knowledge of the case by reason of his employment within the ECA, regardless of whether the Government was able to prove the attorney had anything to do with the case in his official capacity.

The Court emphasized that its decision took into consideration the practical aspects of the unique problems presented in cases of public employment. It declared:

> If service with the Government will tend to sterilize an attorney in too large an area of law for too long a time, or will prevent him from engaging in practice of the very specialty for which the Government sought his service—and if that sterilization will spread to the firm with which he becomes associated—the sacrifices of entering Government service will be too great for most men to make.

(U.S. v. *Standard Oil Company (New Jersey)*, United States District Court, Southern District of New York, December 14, 1955, Kaufman, J., 136 F. Supp. 345.)

Courts . . . *reversal and mandate*

■ Five of the six teachers at Oklahoma A. & M. who successfully challenged a state-prescribed loyalty oath in the Supreme Court of the United States in *Wieman* v. *Updegraff*, 344 U. S. 183, have won a complete vindication in the Supreme Court of Oklahoma.

The case originated when a taxpayer sought to enjoin the college from paying salaries to six teachers who refused to sign the loyalty oath. An injunction was granted by the trial court and affirmed by the Supreme Court of Oklahoma (205 Okla. 301). The teachers, who had intervened below, appealed to the Supreme Court of the United States, which reversed and remanded for proceedings not inconsistent with its opinion.

The trial court then reset the case for hearing and subsequently entered an order permitting the teachers to file a loyalty oath from which language found objectionable by the Supreme Court had been deleted. One signed; the others didn't. The trial court then entered judgment against the non-signers, and they appealed again to the Supreme Court of Oklahoma.

The Court held that the opinion and mandate of the United States Supreme Court had stripped Oklahoma courts of any discretion in the case and that the court of original jurisdiction should have denied the plaintiff any relief.

(Wieman v. *Updegraff*, Supreme Court of Oklahoma, October 2, 1956, *per curiam*, 301 P. 2d 1003.)

Criminal Law . . . *ability to defend*

■ With each member of its three-judge panel filing a separate opinion, the Court of Appeals for the Seventh Circuit has reversed the dismissal of an indictment granted on the claim of the defendant in a net-worth income-tax prosecution that a Goverment jeopardy assessment had tied up all his funds so that he was unable to hire an accountant necessary to prepare a proper defense.

The Government had first com-

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

menced a civil suit in the Tax Court of the United States. While it was pending, a $342,120.37 jeopardy assessment was levied against the defendant. Later the defendant was indicted on criminal charges of tax evasion. With the defendant stripped of his means by the tax liens, the Government successfully resisted attempts to have the civil case tried, but insisted on trying the criminal case.

The district judge, when the defendant filed an affidavit of financial inability, suggested that the Government release part of the money in escrow to the clerk of the court to be used to pay for the defense, including accounting services. The Government refused to do this, whereupon the trial court dismissed the indictment.

Writing the judgment of the Seventh Circuit, Judge Schnackenberg directed reinstatement of the indictment, primarily on the ground that dismissal was premature. His theory was that the defendant's claim that he was being deprived of his constitutional right to a defense could be tested only by examining the record on appeal from a conviction. "It is illogical for a court to speculate in advance of a trial on the question of whether a defendant will or will not receive a fair trial without the assistance of an accountant", he wrote. He also pointed out that dismissal of the indictment discounted several pertinent contingencies: that the defendant might be able to borrow money, that an accountant might volunteer services, that an accountant might not be necessary in the final analysis, and that the defendant might be acquitted.

Judge Major concurred, but declared that the reversal was without prejudice to the trial judge's right to grant a continuance, even indefinitely, to afford the defendant protection. He said it was his opinion that the defendant was entitled to his own funds to conduct his defense and that "he should not be required or expected to depend upon Santa Claus as a source for funds".

Dissenting, Chief Judge Duffy said that since the prosecution was to be on the net-worth theory, the services of a skilled accountant were "absolutely necessary". He concluded that the "harsh conduct" of the Government in purposely rendering the defendant an indigent violated due-process rights under the Fifth Amendment and assistance-of-counsel rights under the Sixth. He thought the Government methods did "not measure up to the standards of conduct which are expected of the Government in a federal court in the prosecution of a defendant on a criminal charge", and that the trial judge took the only practical course in dismissing the indictment.

(U.S. v. *Brodson,* United States Court of Appeals, Seventh Circuit, October 31, 1956, Schnackenberg, J.)

Criminal Law . . . *confessions*

■ The Court of Appeals for the District of Columbia Circuit has come up with multiple exegeses of the rule of the *McNabb* case (*McNabb* v. *U.S.*, 318 U.S. 332). The Court has reversed the second-degree murder conviction of a woman who was held by the police for about sixteen and a half to nineteen and a half hours before she confessed and who was not taken before a magistrate until more than twenty-four hours after the arrest. But it split six-to-three and filed four opinions.

Four of the majority asserted that the nub of the *McNabb* rule is that confessions are excluded for admission in evidence in federal cases if obtained while the defendant is being illegally held, that is, if he is not taken before a magistrate "without unnecessary delay", in accordance with Rule 5 (a) of the Federal Rules of Criminal Procedure. In their view, it is somewhat immaterial whether the confession is obtained by coercive means. The *McNabb* rule, they said, "operates as a sanction against police irregularities that create an *opportunity* [Court's emphasis] for third degree methods by compelling an accused to face his questioners incommunicado, uncounseled, and uninformed of his rights".

Two members of the majority believed that the *McNabb* rule requires not only an illegal police detention for questioning, but also that the confession is a product of the detention. To them, however, the facts of the instant case showed that the confession resulted from and was a fruit of the detention.

The three dissenters agreed with this latter view of the rule, but asserted that the defendant's confession in the instant case was voluntary and not the product of her being detained and questioned over a Sunday before facing a committing magistrate. Thus, they said, the confession was not excludable within *McNabb's* ambit. They stated, moreover, that even if a confession fell within *McNabb,* a conviction should not be reversed if, excluding the confession, the remaining evidence is sufficient to support the jury's finding of guilt, because the *McNabb* rule does not arise from constitutional sources but from the Supreme Court's supervisory power over federal courts.

(Rettig v. *U.S.,* United States Court of Appeals, District of Columbia Circuit, October 26, 1956, Edgerton, J., announced the judgment of the Court.)

Criminal Law . . . *search and seizure*

■ In 1955 the Supreme Court of California adopted the doctrine, conforming to the federal rule, that evidence procured in an illegal search is not admissable in a criminal trial *(California* v. *Cahan,* 44 Cal. 2d 434). Applying this rule, a California court has held that evidence of one crime is not admissible if gained by a search as a result of the defendant's arrest for another crime of which he obviously was not guilty.

The movements of the defendant in the instant case had been watched by the police for three weeks. He

was apparently suspected of being a bookmaker. But he was arrested for vagrancy, and after his arrest the police searched his car and seized the only real evidence relating to bookmaking, the crime for which he was eventually convicted.

The District Court of Appeal for the First District found that there was no reasonable suspicion to support the vagrancy arrest and that it was little more than a subterfuge for apprehension of the defendant. Since the arrest was not proper, the Court reasoned, the search, being predicated on an illegal arrest, was improper.

The Court rejected police statements that the defendant had consented to the search by giving the officers the keys to his car. A consent under the circumstances of this arrest could not be real, it said.

In passing the Court took a swipe at the "outdated concept [of the vagrancy statute] that it is a criminal offense not to work". Under the statute's definition of a vagrant, it declared, "every unemployed person, every housewife and every retired person conceivably could be arrested for vagrancy".

(California v. *Wilson,* California District Court of Appeal, First District, October 8, 1956, Peters, J., 301 P. 2d 974.)

Criminal Procedure . . . *habeas corpus*

■ A judge of the Court of Appeals for the Ninth Circuit, writing a dissenting opinion, has suggested a way to curtail the "appalling volume" of applications for writs of habeas corpus with which state prisoners are flooding federal courts.

Judge Pope suggests that the district courts should grant hearings, rather than denying the petitions without hearing, even if, as he concedes in many instances, the petitions have "an air of incredibility" and seem to be without merit. He declares that the "filing of contrived petitions will not be discouraged by too critical a construction of petitions with summary denials thereof". This procedure, he contends, too often leads to extensive appeals and delays.

His remedy is an immediate hearing in the district court, which would reveal a fabricated case if one existed. In such cases, he continues, the court's findings could so state and "the whole matter could be brought to an end by denial of a certificate of probable cause".

The instant case followed the usual pattern: conviction in a state court for a crime, followed by unsuccessful appeals through the state courts. Then unsuccessful state habeas corpus proceedings, followed by a denial of certiorari by the United States Supreme Court. Then application for a writ of habeas corpus in a federal district court, followed by a denial without a hearing on the facts. The majority of the Ninth Circuit panel affirmed.

(Simpson v. *Teets,* United States Court of Appeals, Ninth Circuit, November 7, 1956, Healy, J.)

Evidence . . . *admissibility*

■ Despite the general rule that a judgment in a criminal case is not admissible to establish the facts in a civil case, the Superior Court of Pennsylvania has found enough exceptions to the rule and tendency away from it to affirm a trial court's admission of the record of the arson conviction of the insureds in a civil suit for the proceeds of fire insurance policies.

The Court held that the trial judge had properly admitted the conviction record and that the conviction was a bar to recovery of the insurance proceeds, on the theory that one who is convicted of a felony should not be permitted to benefit from his crime.

On the question of admissibility, the Court conceded that the generally accepted rule is different. It noted, however, that Pennsylvania has held that a wife who murders her husband cannot obtain the benefits of a trust created by the victim for her, and that a beneficiary of insurance on the life of one who is executed after conviction for murder cannot recover.

The Court detected and followed what it said was a tendency to abandon a flat rule that no criminal judgment is admissible in a civil suit, in favor of the adoption of a more flexible rule giving leeway to approach the problem from the point of view of the particular conviction. Thus, it concluded, the "rule as to the admissibility of a beneficiary's conviction for murder of the insured in an action on an insurance policy may differ from that as to the conviction for a traffic violation in a negligence action. . . ."

(Mineo v. *Eureka Security Fire & Marine Insurance Company,* Superior Court of Pennsylvania, October 3, 1956, Woodside, J., 125 A. 2d 612.)

Insurance Law . . . *co-operation clause*

■ In a case of first impression, the Court of Appeals of New York, with three judges disagreeing, has held that the so-called co-operation clause in an automobile liability policy does not require the insured to "co-operate" to the extent of permitting a cross-suit to be brought in his name.

The factual situation in the case was somewhat unusual. The insured's car was being driven by his mother with the consent of the insured who was not present. The mother was accompanied by her husband (father of the insured) when she was involved in an accident with a third party, in which the husband suffered fatal injuries. The mother and another, as executors of the decedent's will, sued the insured in a wrongful-death action.

The insured refused to sign a cross-complaint prepared by the attorney retained by the insurance company and designed to bring the mother into the suit individually. The insurer sought a declaratory judgment that it was excused from defending because the insured, by refusing to sign the cross-complaint, had violated the co-operation provisions of the policy, which, among other things, required him to "as-

sist . . . in the conduct of suits".

The Court held that the reference to the "conduct of suits" referred to suits brought against the insured, in which he was under an obligation to co-operate in defending, but that it did not mandate his "co-operation" in instituting a cross-suit. The Court found, moreover, that the insured did in fact co-operate to the full extent required by the policy provisions.

Three members of the Court concluded that the insurance contract required the insured to join in filing a cross-suit or counterclaim, particularly where, as here, the cross-suit would be between "active and passive tort-feasors already joined as defendants in an action". But they too felt that the insurer had insufficient grounds to declare a forfeiture of the policy on the ground of non-co-operation, in view of the insured's offer to submit an agreed case to the courts.

(*American Surety Company of New York* v. *Diamond*, Court of Appeals of New York, July 11, 1956, Desmond, J., 1 N.Y. 2d 594, 136 N.E. 2d 876.)

Libel and Slander . . . *lawyers and actors*

■ A lawyer and a radio-television actor have been unsuccessful recently in separate libel actions.

The Court of Appeals for the Seventh Circuit has affirmed a summary judgment against a Chicago lawyer who sued a group of attorneys, alleging that a pleading they filed with the Committee on Hearings of the American Bar Association was libelous.

The plaintiff had filed a complaint against the defendants with the Association's Committee on Professional Ethics and Grievances. The Committee refused to entertain the complaint and the plaintiff appealed to the Association's Committee on Hearings. That Committee invited the defendants to file with it "any answer or supporting material they desire". This they did, and the Committee chairman, following established procedure, distributed copies of the material to each member. It was this material that the plaintiff claimed contained libelous and defamatory statements.

The Court held that an essential ingredient of libel—publication—was lacking. It ruled that the filing of the material with the Committee chairman was not publication, and that the subsequent distribution of the material, even if it were publication, was accomplished by the Committee rather than the defendants. The Committee, the Court said, could not be considered the agent of the defendants.

The Court also noted that the plaintiff himself set in motion the procedure that resulted in dissemination of the alleged libel and that there was no allegation that the material had ever been read by anyone.

(*Ginsburg* v. *Black*, United States Court of Appeals, Seventh Circuit, November 1, 1956, Schnackenberg, J.)

■ In the other case New York's Court of Appeals has affirmed the dismissal of a suit brought by a radio-television actor against the publishers of *Red Channels*, a paperback book published in 1950.

Red Channels is divided, like Gaul, into three parts. The first propounds the thesis that Communists, Communist sympathizers, fellow-travelers and just plain dupes—well-meaning and otherwise—have infiltrated radio and television. The second section is a list of persons and their alleged connection with or unconscious aid of the Communist cause. In this part appeared the name of the plaintiff and the notation that he had been a speaker at a meeting in 1942 of an organization listed by the House Committee on Un-American Activities and that he had attended a meeting in 1949 of a group which advocated the abolition of the House Committee. The book did not allege that the plaintiff was a Communist or a conscious Communist pawn. The third part of *Red Channels* is an alphabetical list of suspect organizations.

The plaintiff conceded that he attended the two meetings and that the organizations could be characterized as Communist fronts. He maintained that he was neither a Communist nor a fellow-traveler, but that the juxtaposition of his name in the list, when taken with consideration of the name of the book and the warnings against infiltration in the first section, libeled him by picturing him as "connected with the Communist Party, either as a 'Communist,' 'dupe,' 'tool,' 'sucker,' colonist' . . . sympathetic to the cause of Communism" and exerting "his influence in radio and television by promoting pro-Soviet, pro-Communist, anti-American" propaganda.

The Court could not go along with this contention for two reasons. First, it agreed with the lower courts that there was nothing defamatory published "of and concerning" the plaintiff. There was a lack of identification of him with any material that might be considered defamatory, the Court said, because the only connection in which he was mentioned was a simple listing of facts. The Court ruled, secondly, that the defendant was protected by the defense of fair comment. By engaging in political activities, it declared, the plaintiff exposed himself to legitimate criticism. "Unless the person is falsely accused of wrongdoing, he or she must accept the criticism or comment", the Court said. "The publisher's right to comment is protected and is not actionable, if reasonable."

Two judges dissented on the ground that the issues of whether the publication was defamatory of the plaintiff and whether it was privileged as fair comment should have been submitted to the jury and not disposed of by the trial court's dismissal at the close of the plaintiff's case.

(*Julian* v. *American Business Consultants, Inc.*, Court of Appeals of New York, July 11, 1956, Burke, J., 2 N.Y. 2d 1, 155 N.Y.S. 2d 1, 137 N.E. 2d—).

Military Law . . . *prisoner-of-war conduct*

■ The United States Court of Military Appeals has turned down an

American soldier's defense that his actions while a prisoner-of-war of the Chinese Communists during the Korean War were the result of brain-washing—"a mental psychosis induced by constant Communist propaganda and pressures"—which made him believe that his efforts were dedicated to bettering the lot of his fellow-prisoners and furthering peace.

The accused was convicted by a court martial of communicating with the enemy without proper authority, of writing a disloyal letter to his hometown newspaper calculated to promote disloyalty and disaffection among civilians in the United States, of informing on a fellow-prisoner and of participating in a trial of a fellow-prisoner. All the acts occurred while the accused was a prisoner-of-war from November, 1950, to September, 1953. Observing that the evidence supporting the convictions was overwhelming, the Court affirmed, but considered the accused's contentions that he had been granted amnesty, that his brain-washed condition was a defense and that the law officer's instructions were faulty.

While the accused was in the hands of the Indian Custodial Forces following the Korean armistice, a member of the United Nations explainer group, whose purpose it was to induce those not wishing to be repatriated to change their minds, told the accused and others in his group that "you and your family will (not) be harmed if you return". The accused claimed that this statement amounted to an amnesty. But the Court rejected the contention, saying that the words did not amount to amnesty, that the grant of amnesty is a non-delegable power of the President and that in any event the President could not speak through a representative of the United Nations.

The Court carefully considered the multi-pronged attacks on the law officer's instructions, especially with respect to communicating with the enemy without proper authority and informing on a fellow-prisoner. It found the instructions free from defect.

Anent the brain-washing defense, the Court said of the accused:

> ... At best, he was a victim of his own selfish desire to improve his internment at the expense of other servicemen; at worst, he was a soldier who betrayed his cause. In either event, it is clear that he failed to discharge his obligation to his country.... It goes without saying that all men cannot stand firm against torture, physical violence, starvation or psychological mistreatment. But in this instance, the record discloses that the accused weakened when others stood fast, and it does not reveal that he was compelled to sacrifice his countrymen because of the use of those influences.

(*U.S.* v. *Batchelor,* United States Court of Military Appeals, September 7, 1956, Latimer, J., 7 U.S.C.M.A. 354.)

Public Utilities Law . . .
central TV antennas

■ Disagreeing with the state's public utilities commission, the Supreme Court of California has ruled that a community television antenna system is not a "public utility" within the meaning of the California statute and therefore not subject to the commission's jurisdiction.

The system serves about 950 customers in a difficult reception area in Contra Costa County. From a master, high gain antenna placed on a high elevation, television signals are picked up, amplified and transmitted by coaxial cable to the subscribers' TV sets. The antenna company's cables are strung on electric and telephone company poles on a rental basis.

The commission found that the company operated as a "telephone corporation". But the Court, primarily on the basis of statutory interpretation, thought otherwise. It emphasized that unless the antenna company was enumerated in the public utilities statute, or reasonably includable within a category enumerated, it could not be considered a public utility. The Court rejected the commission's apparent reasoning that since television broadcasts can be carried by telephone lines, that any line erected to carry a television broadcast is a telephone line and the operator a "telephone corporation".

The Court noted that two other states have considered the question of whether a community television antenna is a public utility. The Wisconsin commission expressed "considerable doubt" in *Re Edwin Bennett,* 89 P.U.R., N.S. 149, and Wyoming, on the basis of the wording of that state's statute, decided they were, *Re Cokeville Radio and Electric Company,* 6 P.U.R. 3d 129 .

(*Television Transmission Inc.* v. *Public Utilities Commission,* Supreme Court of California, October 5, 1956, Traynor, J., 301 P. 2d 862.)

Schools . . .
segregation

■ Little Rock's plan to commence integration of its public school system in 1957 and complete it by 1963 has been approved by the United States District Court for the Eastern District of Arkansas. The Court has refused to grant an injunction requiring immediate acceptance of Negro children in segregated schools.

Three days after the *School Segregation Cases* decision, 347 U.S. 483, the school board announced that it was their "responsibility to comply with federal constitutional requirements and we intend to do so". The board then undertook to develop an integration program, which was announced a week before the Supreme Court's supplemental decision in 349 U.S. 294. The plan, geared to new school construction, envisions progressive integration, beginning at the high-school level in 1957, and continuing to the elementary-school level by 1963.

The Court emphasized the Supreme Court's recognition that desegregation would have to be policed by district courts because of their proximity to local conditions and that those courts should be guided by equitable principles. The Court found that the Little Rock plan was "a prompt and reasonable start", as required by the Supreme Court.

The Court declared that it would not substitute its judgment for that of the school board. The board's plan, it added, would lead to "an

effective and gradual adjustment of the problem, and ultimately bring about a school system not based on color distinctions".

(*Aaron* v. *Cooper*, United States District Court, Eastern District of Arkansas, August 27, 1956, Miller, J.)

Torts . . .
right of privacy

■ Faced with a paucity of Pennsylvania appellate decision on the subject, the Superior Court of Pennsylvania has assumed that an action for violation of the right of privacy exists in the state. The Court did this for the purpose of deciding what statute of limitation was applicable.

The crucial question was whether a two-year or six-year limitation applied. The six-year statute applies to "actions upon the case" and the two-year period to suits brought "to recover damages for injury wrongfully done to the person". The Court held an invasion of the right of privacy was an injury "to the person", and that the two-year limitation therefore barred the action in the instant case.

Relying on various judicial interpretations and the famous Brandeis and Warren article of 1890 in 4 *Harvard Law Review* 193, the Court concluded that the injury involved in right-of-privacy cases is to a person's sensibilities, which are afforded protection by the law just as is his body. It emphasized that it was this personal injury, rather than degradation of a person's reputation, that counted in right-of-privacy cases.

Although not necessary to its disposition of the case, the Court further stated that the plaintiffs did not have an actionable right-of-privacy case.

(*Hull* v. *Curtis Publishing Company*, Superior Court of Pennsylvania, October 3, 1956, Woodside, J., 125 A. 2d 644.)

Trial Practice . . .
pretrial proceedings

■ A warning that pretrial machinery cannot be used in negligence cases by parties or counsel who continually exaggerate or minimize claims has been issued by a New York judge. In obvious disgust with the settlement tactics of an insurance company, the judge has barred cases in which the company is involved from the pretrial calendar and has remanded the cases for trial.

Responsible for the judge's ire was an action by an infant against a building owner for a finger injury caused by a self-service elevator door that closed too rapidly. The judge declared he believed it to be "evidence of bad faith" on the part of the insurance company not to make a counteroffer to the plaintiff's demand of $7,500.

The company, the judge said, had been using the pretrial proceeding continually as a means of "eliciting information supplied in the mistaken hope of a fair offer". He also noted that a representative of the company had told him that it was their experience that plaintiffs can be softened up to take nominal sums on the eve of trial.

Pretrial will defeat itself, the judge warned, if either these tactics, or claims for excessive damages, are permitted. "The court should not allow itself to be used in any effort at pretrial designed to effectuate an immediate or final settlement for an inappropriately nominal or excessive sum."

The judge did not identify the offending insurance company.

(*Congemi* v. *Silverman*, New York Supreme Court, Trial Term, Kings County, June 8, 1956, Brenner, J., 155 N.Y.S. 2d 854.)

United States . . .
passports

■ The State Department, which has been taking its lumps lately from the Court of Appeals of the District of Columbia Circuit for the denial of passports, has been upheld by the Court in its refusal to issue a passport to Paul Robeson.

The Court has held that Robeson failed to exhaust administrative remedies and could not therefore maintain a suit seeking a declaration that the passport rules and procedures of the Department are invalid and a decree directing the issuance of a passport.

Upon two occasions Robeson applied for passports, but was told that it "would appear" that he was precluded from obtaining one because of alleged Communist affiliations and activities. The Department advised Robeson of his right to seek an administrative review. This he declined to do, on the ground that the regulations were invalid.

The Court, sitting *en banc*, said: "We cannot assume the invalidity of a hearing which has not been held or the illegality of questions which have not been asked."

(*Robeson* v. *Dulles*, United States Court of Appeals, District of Columbia Circuit, June 7, 1956, Prettyman, J., 235 F. 2d 810.)

[EDITOR'S NOTE: The Supreme Court of the United States denied certiorari in the foregoing case on November 5, 1956.]

Wills . . .
construction

■ Periodically the reports turn up perplexing holographic wills. Here is a late one from California:

> March 30–48
>
> In case of my Death a very short Memorial Service at Benbough Mortuary. Every thing strictly private no flowers notify Mr. & Mrs. Gustav Keppner, 1927 Grand ave Butte Montana I want Inez my Daughter to have all My Personal belongings that is Mrs. Keppner Phil Harding my son $1 dollar–don't notify any one else my two Sisters are very old and Widows and unable to come
>
> Mrs. V. E. Olson
> San Ysidro Cal.
>
> No Hardings Please
> my last wish

The testatrix left six heirs: Inez Keppner, a daughter; Phil Harding, a son; and four children of a predeceased daughter. Everyone claimed something, the contentions of Phil and the grandchildren being predicated on the theory that the will did not dispose of the residue and that they were entitled to statutory shares.

But the California District Court of Appeal for the Fourth District untangled it this way: the fact that the

testatrix made a will indicated that she intended to dispose of all her property; Phil was specifically disinherited; "personal belongings", as used in this will, is susceptible of meaning "all of my property"; therefore, the will passed the entire estate to Inez, subject to Phil's lonely dollar.

(*In Re Olson's Estate*, District Court of Appeal of California, Fourth District, September 27, 1956, Griffin, J., 301 P. 2d 501.)

What's Happened Since . . .

▪ On July 11, 1956, the Court of Appeals of New York (1 N.Y. 2d 499, 154 N.Y.S. 2d 455, 136 N.E. 2d 523) REVERSED and reinstated the judgment in *Berg* v. *New York Society for the Relief of the Ruptured and Crippled*, 286 App. Div. 783, 146 N.Y.S. 2d 548 (42 A.B.A.J. 461), in which the Appellate Division for the First Department had held that a hospital was not liable for a mistake made by its laboratory technician in determining a patient's blood factor, because the activity was medical and the hospital was thus immune. The Court of Appeals ruled that while the blood test may have been a "medical act", it was performed by an employee whose status could not be termed "professional", and that therefore the activity was administrative, for which the hospital was liable.

▪ On June 20, 1956, the United States District Court for the District of Massachusetts (142 F. Supp. 550) approved an injunction in *Colgate-Palmolive Company* v. *Max Dichter & Sons, Inc.*, 142 F. Supp. 545 (42 A.B.A.J. 862; September, 1956), wherein a fair-trade manufacturer sought judicial enforcement of fair-trade contracts against a non-signer discount house, against a defense that the manufacturer was not entitled to injunctive relief because it permitted its fair-trade signers to issue trading stamps amounting to a trade discount. Following the original decision of June 8, 1956, the manufacturer adopted a position that trading stamps reduce prices and notified its signed customers to stop issuing them on its products. This action, the Court said, showed that the manufacturer was proceeding in good faith and entitled it to an injunction. In a second supplemental opinion issued July 12, the Court dismissed the complaint of the intervenor, a trading stamp company, as moot. The issue whether trading stamps conflict with the Massachusetts fair-trade law is now in litigation in the Massachusetts courts, and the Court said that the state courts should dispose of that question. It remarked that its opinion, insofar as it affected the trading-stamp company, had been "downgraded . . . to obiter dicta".

▪ On October 8, 1956, the Supreme Court of the United States:

DENIED CERTIORARI in *Krebiozen Research Foundation* v. *Beacon Press, Inc.*, 134 N.E. 2d 1 (42 A.B.A.J. 768; August, 1956), leaving in effect the decision of the Supreme Judicial Court of Massachusetts that the overriding constitutional right of freedom of the press and the public's interest in discussion of cancer cures precludes the issuance of an injunction barring the publication and distribution of a book attacking an alleged cancer-cure drug, even though the book may be defamatory.

DENIED CERTIORARI in *Allendorf* v. *Elgin, Joliet & Eastern Railway Company*, 8 Ill. 2d 164, 133 N.E. 2d 288 (42 A.B.A.J. 663; July, 1956), leaving in effect the decision of the Supreme Court of Illinois that, in view of the supremacy clause of the Federal Constitution, a provision of the Illinois wrongful-death act barring an action in Illinois where the death occurred outside the state and a right of action exists in such other state is unconstitutional, and cannot be applied to preclude in Illinois a wrongful-death action under the Federal Employers' Liability Act, where the death occurred in Indiana.

▪ On October 15, 1956, the Supreme Court of the United States:

DENIED CERTIORARI in *NLRB* v. *Textile Workers Union of America*, 227 F. 2d 409 942 A.B.A.J. 72; January, 1956), leaving in effect the decision of the Court of Appeals for the District of Columbia Circuit that a union's campaign of harassing tactics against an employer, including organized refusal to work overtime, unauthorized extensions of rest periods and slowdowns, did not constitute a failure to bargain in good faith under the Taft-Hartley Act. A previous order granting certiorari (76 S. Ct. 650) was vacated.

▪ On November 5, 1956, the Supreme Court of the United States:

DENIED CERTIORARI in *Farley* v. *U.S.*, 139 F. Supp. 757 (42 A.B.A.J. 571; June, 1956), leaving in effect the decision of the United States Court of Claims that a United States marshal is an executive officer whose duties are ministerial and purely executive, and that he can be removed from office by the President before the expiration of the statutory term of his office.

VACATED JUDGMENT of the Court of Appeals for the District of Columbia Circuit in *Cozart* v. *Wilson*, 236 F. 2d 732 (42 A.B.A.J. 958; October, 1956), and remanded the case to the district court with directions to dismiss the petition for a writ of habeas corpus on the ground that the cause is moot. The question decided by the Court of Appeals was that Japan had jurisdiction to try rape and manslaughter charges against American servicemen stationed in Japan, where the alleged crimes occurred on Japanese territory.

GRANTED REHEARING in *Kinsella* v. *Krueger*, 76 S.Ct. 886 (42 A.B.A.J. 772; August, 1956) and invited counsel upon reargument to cover several specified points relating to the power granted to courts martial by Article 2(11) of the Uniform Code of Military Justice to try crimes committed by civilians "accompanying the armed forces without the continental limits of the United States". The defendant was convicted by an Army general court martial in Japan of murdering her Army-colonel husband. The United States District Court for the Southern District of West Virginia [137 F. Supp. 806] (42 A.B.A.J. 354; April, 1956), denied

her application for a writ of habeas corpus. On June 11, 1956, the Supreme Court, the majority composed of five justices, affirmed (42 A.B.A.J. 766; August, 1956). Three justices dissented and one filed a reservation to express his views at a later date. Six justices now join in ruling for a rehearing, while three feel rehearing should be denied.

■ On October 25, 1956, the Court of Appeals for the Eighth Circuit AFFIRMED *Hoxie School District No. 46* v. *Brewer*, 135 F. Supp. 296 (42 A.B.A.J. 355; April, 1956), leaving in effect the decision of the United States District Court for the Eastern District of Arkansas that federal courts have jurisdiction to entertain suits for injunctions against persons or organizations opposing integration of schools by means that actually interfere with the operation of a community's public-school system. Several bases of jurisdiction were found by the Court, including the duty of the federal judiciary to vindicate constitutional rights. It ruled that the case arose under the Constitution and laws of the United States within the meaning of 28 U.S.C.A. §1331.

■ On November 13, 1956, the Supreme Court of the United States:

AFFIRMED *Browder* v. *Gayle*, 142 F. Supp.—707 (42 A.B.A.J. 860; September, 1956), in which the United States District Court for the Middle District of Alabama had ruled that Alabama statutes and a Montgomery city ordinance requiring segregation of races on intrastate buses violate the Fourteenth Amendment. The Supreme Court affirmed without opinion, citing the *School Segregation Cases*, 347 U.S. 483, *Mayor and City Council of Baltimore* v. *Dawson*, 350 U.S. 877, and *Holmes* v. *Atlanta*, 350 U.S. 879.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ The following article is a condensation of a lecture given at the University of South Dakota and later published in full in the spring, 1956, issue of the South Dakota Law Review. The lecturer is Professor of Law at New York University and Director of the Institute of Judicial Administration.

The Role of Legislatures in the Development of Substantive Law

by Shelden D. Elliott

1. *Magna Charta and Beyond.*

■ It must be admitted that, in recent centuries, statutes and legislation have come to be regarded in some legal quarters as unwelcome incrustations on or displacements of the time-honored Anglo-American common law. I submit that such attitude, spurious and sporadic as it is, is more hysterical in origin than historical. For, as analysts of history have observed, there is a natural tendency to contrast statutory law with common law, to counterpose legislation against custom, and to assimilate the common law as merely the recognition, and the only recognition, of custom. But in a larger sense, custom itself is an elemental form of legislation, a normative unanimity of unpromulgated group-will.

Carleton Kemp Allen has observed that:

> The difference between custom and legislation as sources of law is manifest. The existence of the one is essentially *de facto*, of the other essentially *de jure*. Legislation is therefore the characteristic mark of mature legal systems, the final stage in the development of law-making expedients. In short, while custom expresses a relationship between man and man, legislation expresses a relationship between man and State.[1]

But the emergence of such ultimate legislative expression stems from unwritten or customary precedent. As we shall see, much statutory law, early as well as recent, has been merely a codification of existing custom, just as the Twelve Tables in Roman law were the reduction to writing of existing unwritten *jus civile* by the ten commissioners who drafted them.

If we turn from the development of legislation to the development of legislative bodies, we note that Parliament as a separate "talking together" did not become a representative prototype bicameral assembly until some three centuries after the Conquest. Central government in the earlier days had been largely informal, unitary and appointive as compared with the later division of functions; hence the concept that "The King has his courts in his councils in his Parliaments". Petitions for relief, addressed to royal authority by individual subjects or groups, were granted redress without a clear-cut delineation between executive, judicial or legislative *fiat*.

When early separate legislating bodies began to emerge, they did not resemble the later-day representative agencies, in the sense of popularly elected assemblies. Rather, the forerunners were the informal *assizes* —the *ad hoc* sessions or voluntary gatherings of groups for particular promulgations. Such, for example, was the Assize of Clarendon in 1166 (12 Henry II), introducing the sys-

1. Allen, LAW IN THE MAKING 403 (5th ed., 1951).

tem of public prosecution of crime and the grand jury.

Magna Charta itself was the product of a famous convocation, and one destined to be a triumphant landmark of Anglo-American basic rights and liberties. It was not the first charter of liberties, as Sir William Holdsworth has pointed out, nor was it the last, but it is undoubtedly the greatest. He observes that it

> . . . differs fundamentally from any preceding charter in the manner in which it was secured, in its contents, and in its historical importance. It was secured by a combination of the landowners, the church, and the merchants; and therefore it contained clauses dealing with their particular grievances. Since the time when the Charter of Henry I had been issued, a centralized judicial system had been created and elaborated. The Charter therefore necessarily contained many clauses which related to the working of that system.[2]

The combination of landowners, the church, and the merchants, to which Holdsworth refers, was no mere fortuitous gathering. It was as purposeful as it was colorful; drawn up in grim and determined array in the meadow of Runnymede; across from the island where the chosen barons presented their demands to an equally grim King John. A point of fundamental principle was at base: the principle that "The King is under God and the Law." But it was the implementation of that principle, in the sixty-three brief chapters of Magna Charta, that established in statutory form a bulwark to be marked as legislation's first great contribution to the common law.

Growth of Legislation and Legislative Bodies

The period from Magna Charta in 1215 onward through the reign of Elizabeth in the sixteenth century was marked by frequent and dramatic statutory incursion into the existing common law. While the statutes of this era are sometimes declaratory, many of them are relatively remedial in areas of substantive law and procedure and the changes they wrought were assimilated into the fundamental law that became part of our American colonial heritage.

Thus, one of the earliest, the Statute of Merton in 1236 (20 Henry III), dealt severally with matters of property (c. 4, rights in the common), of status (c. 6, abduction and marriage), and of procedure (c. 8, limiting novel disseisin).

Other statutes made significant changes in the fundamental laws of property rights and of inheritance. Such, for example, were the Statute of Mortmain in 1279 (7 Edward I), the Statute of Quia Emptores in 1290 (18 Edward I), abolishing subinfeudation, the Statute of Uses in 1536 (27 Henry VIII), and the Statute of Wills in 1539 (30 Henry VIII).

It was during this period, too, that Parliament emerged from its struggle to free itself from royal domination, and developed its present bicameral form of organization. The gradual exclusion of judges and of other officials representing the King was accompanied by the growing doctrine of "peerage" and the concept of hereditary membership in the House of Lords. Such membership came to include certain privileges, like the right to be tried by one's peers for a criminal offense.

Less dramatic than the rise of the House of Lords but no less significant, was the steady growth of the House of Commons as a separate body, representative rather than hereditary in membership and comprising the various burgesses and knights of the shire. By 1400 they had achieved not only their organizational status as a distinct deliberative entity, with their own elected speaker to serve as their spokesman in appearing before the King and the Lords, but also the establishment of certain parliamentary privileges and prerogatives of their own.

This, then, was the homeland background and pattern when the American colonies were founded on this side of the Atlantic. And from the colonial legislative bodies derived both the form and the scope of authority of our early state legislatures. But further circumstances combined to shape the public opinion as well as the popular elective method of choosing our first legislative assemblies. It should be remembered that the colonial legislatures had stood up against the Crown and its direct representatives, the governors and the judges. Legislators spearheaded the drive for independence, and they upheld the local interests of the colonists in opposing English trade policies. Small wonder, then, that our forefathers had a deeply ingrained confidence in their early legislatures.

[The author here mentions some legislative abuses of power which led to constitutional restrictions.—Ed.]

The Struggle for Codification

Overlapping in part the events and developments I have just mentioned is the era that marks the ascendancy of codification as an over-all approach to legal synthesis and law reform. On the European continent, against the background of Justinian and the medieval jurists, the movement attained widespread acceptance, distinguished by the adoption of the French Civil Code in 1804, representing largely the efforts and work product of Pothier of the latter part of the eighteenth century. Despite the opposition of Savigny and other representatives of the historical school of jurisprudence in the early nineteenth century, the codification movement gained firm adherents in Europe and Asia. The Swiss Civil Code of 1900 was widely regarded as embodying advanced principles of codification, developed and formulated by Eugen Huber. Meanwhile Germany and Japan in 1896 had adopted civil codes and China followed in 1930.

Across the English Channel, Jeremy Bentham, who lived from 1742 to 1832, watched with envious admiration the progress of codification in contemporary France. He saw

2. Holdsworth, History of English Law 210 (1923).

in it an ideal solution for what he regarded as the evils of the common law.

Bentham's pleas for codification (of the common law) found little favor in England although they did attract attention and gained some support in the United States. Among the chief proponents of codification here was David Dudley Field, of New York, whose devotion to the subject occupied most of his professional life. His efforts produced the code of procedure which was adopted in New York in 1848 and formed a substantial basis of similar codes in many other states. New York, on the other hand, failed to accept the proposed civil code and its failure to do so may have been an important factor in limiting the general codification movement.

Among the strong opponents of the codification movement was James C. Carter, a graduate of Harvard Law School and an active New York attorney, who had taken a leading part in blocking the adoption in New York of Field's proposed civil code. Carter himself wrote, in a draft preface for certain proposed lectures published posthumously:

> This proposed Code purported to be the work of the Legislative Commission which had been created by an Act of the same Legislature, adopted many years before, and at the head of which was the late David Dudley Field; but it was in fact, as he often declared, entirely his own work. This eminent lawyer was a man of great intellectual audacity, the worthy disciple in that particular of Jeremy Bentham. He would not tolerate the suggestion that there was any insurmountable difficulty in reducing into statutory form the entire body of the law which governs the private transaction of men. He insisted that the whole of it could be embraced in a volume of very moderate size and that its adoption would substantially supersede the necessity of consulting that prodigious record of precedent which fills so many thousand volumes and has been hitherto deemed an essential part of the furniture of every comlete law library.[3]

Although codification by that name is no longer the driving force that it might have been, the same objectives are being achieved by compilation and statute revision in all the other states. Hence, the distinction between "code states" and "common law states" has ceased to have vitality or substance.

But among the states themselves, there are differences in statute law which are being progressively diminished and harmonized. In this area, the growth and spread of uniform laws are well worth noting.

To date the National Conference of Commissioners on Uniform State Laws has either drafted or endorsed an impressive array of proposed model statutes whose acceptance by the state legislatures continues at an accelerating rate.

Another pressure, characteristic of the present century, is the drive toward increased use of the state's police power in the form of regulatory legislation to meet emergency needs or in response to growing demands for long-range government guardianship of the public interest. By way of illustration, I single out an area that is characteristic of such present-day legislative growth: the proliferation of state-wide licensing boards to regulate and control the practice of certain professions and occupations.

Thus, in the South Dakota Code of 1939 and in supplementary legislation, I find that the following callings have come under such regulatory and licensing requirements: abstracters (Tit. 1); architects, engineers and surveyors (Tit. 18); attorneys (Tit. 32); barbers (Ch. 27.16); certified public accountants (Tit. 9); chiropodists (Ch. 27.08); chiropractors (Ch. 27.05); cosmeticians (Ch. 27.15); dentists (Ch. 27.06.); embalmers and funeral directors (Ch. 27.14); optometrists (Ch. 27.07); pharmacists (Ch. 27.10); physicians and osteopaths (Ch. 27.03); registered nurses and licensed practical nurses (Ch. 27.09); and veterinarians (Ch. 40.02). Truly, the horizons in this potential area of occupational regulation are practically limitless, when we consider that states like California have already moved them outward to include yacht brokers, rainmakers, and seeing-eye dogs.

Modern legislatures constantly demonstrate their capacity to keep in touch with, and to adapt the law to, current needs and developments. In its 1955 session laws your South Dakota Legislature has shown, by a few examples I have here chosen at random, how closely its collective finger is on the pulse of today's sociological and technological bloodstream. Consider the timely up-to-dateness of the following, as indicated by their respective titles: Ch. 26, Repealing Sunday Blue Law; Ch. 69, Substituting Word "Pesticide" for "Economic Poison"; Ch. 108, Prohibiting Drive-In Theatre Screen to Face Highway; Ch. 110, Authorizing History Department to Microfilm Public Records; Ch. 264, Authorizing County Levy for Weather Modification (*i.e.*, Rainmaking) Fund; Ch. 271, Requiring Loyalty Oath of Public Employees; and Ch. 344, Appropriating Money to Pay OASI (Old Age and Survivors Insurance) of Legislators.

The foregoing, however, are but minor straws in the wind; mere incidental and directional indications of the larger developments and problems ahead. As Chief Justice Arthur T. Vanderbilt has recently stated: "... the really great task of jurisprudence in the second half of the twentieth century is to reform our substantive law to meet the needs of the times".[4]

3. Carter, LAW: ITS ORIGIN, GROWTH AND FUNCTION V (1907).

4. Vanderbilt, THE CHALLENGE OF LAW RE-

1957 ANNUAL MEETING
NEW YORK, N. Y., JULY 14-16, 1957

The New York portion of the Eightieth Annual Meeting of the American Bar Association will be held on July 14-16, 1957, and will then recess to reconvene in London, England, July 24-30, 1957. Most of the Sections of the Association will meet prior to July 14 in New York, and certain of them will reconvene in London. The preliminary program of the meeting appears in this issue of the JOURNAL, and further detailed information with respect to the meeting will be published in forthcoming issues.

In requesting hotel reservations, please note the necessity of remitting the Annual Meeting registration fee of $10.00 for the New York portion, if you have not previously registered for London, which registration covers the New York portion. Also furnish information as to your preference in hotels (first, second and third choice), definite arrival date and whether such arrival will be during the day or evening, and probable date of departure.

Applications for reservations will be accepted only from members of the Association and their guests.

Reservation confirmations will be mailed approximately ninety days before the meeting convenes in New York.

Hotel Reservations

HEADQUARTERS HOTEL—WALDORF-ASTORIA

HOTEL ACCOMMODATIONS, ALL WITH PRIVATE BATH, HAVE BEEN SECURED IN THE FOLLOWING HOTELS. CURRENT RATES, AS FOLLOWS, MAY BE SUBJECT TO CHANGE.

Hotel	Single	Double-bed (For 2 Persons)	Twin-beds	Parlor, Bedroom & bath
AMBASSADOR (Park & 51st)	$15.00-$22.00	$18.00-$25.00	$18.00-$25.00	$30.00-$52.00
BARCLAY (111 E. 48th)	14.95		19.95	30.95
BELMONT PLAZA (Lexington & 49th)	8.85	10.85	12.85	30.00
BILTMORE (Madison & 43d)	13.95- 15.95		17.95- 19.95	37.95- 41.95
COMMODORE (42d & Lexington)	7.00- 12.00	11.50- 14.50	13.00- 16.50	19.00- 42.00
PLAZA (Fifth & 59th)	11.00	18.00	18.00	30.00
ROOSEVELT (Madison & 45th)	10.00- 15.00	16.00- 18.00	18.00- 22.00	32.00- 36.00
SHELTON (Lexington & 49th)	8.00- 13.00	11.00- 16.00	11.00- 16.00	17.00- 22.00
WALDORF-ASTORIA (Park & 50th)	12.00- 19.00	18.00- 25.00	18.00- 25.00	35.00- 55.00

EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed, to be occupied by ONE person. A double room contains a double (one) bed, to be occupied by TWO persons. A twin-bed room will NOT be assigned for occupancy by one person. A parlor suite consists of sitting-room and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the sitting-room.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating HOTEL (FIRST, SECOND AND THIRD CHOICE); number and type of room or rooms required; names and addresses of all persons who will occupy same, definite arrival date and whether such arrival will be during the day or evening; and probable date of departure.

Members who expect to arrive on early morning trains can avoid inconvenience of waiting for rooms by having reservations made for preceding evening and by paying for one additional day. Rooms reserved for morning arrival cannot be made available before midafternoon, unless voluntarily vacated by last occupant.

REGISTRATION FEE

REQUESTS FOR RESERVATIONS FOR HOTEL ACCOMMODATIONS SHOULD BE ACCOMPANIED BY PAYMENT OF THE ANNUAL MEETING REGISTRATION FEE IN THE AMOUNT OF $10.00 FOR EACH LAWYER, unless previously registered for London, which registration fee includes the New York portion of the meeting. This fee is **not** a deposit on hotel accommodations, but is used to help defray expenses for services rendered in connection with the meeting. The Board of Governors solicits your cooperation in thus facilitating the handling of the registration fee and in partially defraying the increasing expense of the Annual Meeting. In the event that it becomes necessary to cancel a hotel reservation, because of inability to attend the meeting, the registration fee (provided you are not attending the London portion) will be refunded, PROVIDED NOTICE OF CANCELLATION IS RECEIVED AT CHICAGO HEADQUARTERS NOT LATER THAN JUNE 24, 1957. ALL UNASSIGNED SPACE WILL BE RELEASED TO THE RESPECTIVE NEW YORK HOTELS, BY THE ASSOCIATION ON JUNE 24, 1957, AFTER WHICH DATE RESERVATIONS MAY BE MADE BY INDIVIDUAL MEMBERS DIRECTLY WITH AVAILABLE HOTELS.

REQUESTS FOR RESERVATIONS, TOGETHER WITH $10.00 REGISTRATION FEE FOR EACH LAWYER FOR WHOM RESERVATION IS REQUESTED, SHOULD BE ADDRESSED TO THE RESERVATION DEPARTMENT, AMERICAN BAR ASSOCIATION, 1155 East 60th Street, Chicago 37, Illinois.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman.**

Venue in Tax Refund Suits by Corporations Against the United States in Federal District Courts

by Thomas N. Chambers
Office of Chief Counsel, Internal Revenue Service
Washington, D. C.

■ Legislative changes in 1954 removed the $10,000 monetary limit on tax refund suits against the United States in federal district courts and granted the right to a jury trial in such suits. Ch. 648, P.L. 559, 83d Cong. 2d Sess. (1954); 28 U.S.C. §1346(a)(1), 2402. Accordingly, a litigant now has in a suit against the United States all the conveniences of an action against the District Director without the uncertainties which arise where the collection official to whom the tax is paid is dead or otherwise out of office. For this reason, it has been predicted that in the future actions against the Director would seldom be used. See Hertzog, *Administrative and Procedural Changes in the New Code,* 32 TAXES 855, 864 (1954). However, two cases decided recently may make it more desirable for some corporate litigants to bring suit against the District Director rather than against the United States.

An action against the United States on a refund claim "may be prosecuted only in the judicial district where the plaintiff resides". 28 U.S.C. §1402(a). It has been established that the only residence of a corporation within the meaning of the venue statutes is in the state and district in which it is incorporated. *Suttle* v. *Reich Bros. Construction Co.,* 333 U.S. 163 (1948).

This would indicate that a corporation can bring a tax refund suit only in the United States District Court in its state of incorporation. However, Section 1391(c) of Title 28, added in 1948, provides as follows:

> (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

An argument has been made and accepted in some courts that the place where suit may be brought by corporate plaintiffs against the United States has been enlarged by Section 1391(c) of the Judicial Code to include a state in which a corporation is doing business. See *Southern Paperboard Corporation* v. *United States,* 127 F. Supp. 649 (S.D. N.Y. 1955). On the other hand, in *Albright & Friel, Inc., of Delaware* v. *United States,* 142 F. Supp. 607 (E.D. Pa. 1956), the Government was successful on a motion to dismiss for improper venue a suit brought by a Delaware corporation against the United States in the Eastern District of Pennsylvania in which the corporation's main place of business was located. It was held that venue was lacking, but the court refused to dismiss the action completely, directing that an appropriate order be prepared for removal of the case to the district court in Delaware in accordance with 28 U.S.C. §1406.

The court reasoned that the plain meaning of Section 1391(c) was that it applied only to suits *against* corporations, not by them. The court noted that Congress alone has power to say when and where the United States may be sued and that had it intended to enlarge the venue granted in Section 1402(a) "the conclusion is inescapable that it would readily have done so with sufficient clarity to make unnecessary resort to the plaintiff's strained construction of §1391(c)". The court also felt that Section 1402(a) was by its terms, exclusive. The same result was reached in *United Merchants & Manufacturers* v. *U.S.,* 123 F. Supp. 435 (M.D. Ga. 1954). There are some non-tax cases which support the contrary result reached in the *Southern Paperboard Corporation* case, *supra.* See *Freiday* v. *Cowdin,* 83 F. Supp. 516 (S.D. N.Y. 1949); *Hadden* v. *Barrow, Wade, Guthrie & Co.,* 105 F. Supp. 530 (N.D. Ohio 1952); contra, *Chicago & North Western Ry. Co.* v. *Davenport,* 94 F. Supp. 83 (S.D. Iowa 1950). See also, Note, *Residence of Corporation for Purpose of Tax Refund Suit,* 55 COL. L. REV. 229 (1955).

Thus, if venue questions are to be avoided, suits against the United States may have to be brought in the judicial district in the state in which the plaintiff corporation was incorporated. On the other hand, suits against the District Director are prosecuted in the place where he personally resides. A corporate taxpayer contemplating a refund suit should determine in advance which place, if there is a difference, is the most convenient. The District Director's residence is usually (but not necessarily) located where the return was filed, *i.e.,* the place of the principal office of the internal revenue district. The corporate return will usually have been filed in the internal revenue district in which the principal place of business or principal office or agency of the corporation is located. Sec. 6091(b)(2), Internal Revenue Code of 1954. The District Director's residence might be located in a judicial district different from that covering the state in which the corporation was incorporated and even different from the judicial district in which the plaintiff corporation's principal place of business is located. Thus, a corpora-

tion incorporated in Delaware and doing business in the District of Columbia files its return with the District Director of Internal Revenue at Baltimore, Maryland, and would bring a suit for refund against the Director in the District Court for the District of Maryland.

The corporate taxpayer might sue the United States in the district of its choice on the chance that the Government will waive venue or that its district court will not follow *Albright & Friel, supra*. The worst that could happen under this decision would be a removal of the case to the judicial district in which the state of incorporation is located. However, if a suit is filed where the tax was paid (and return filed) and if removal would be inconvenient, the safe procedure would be to sue the District Director, for he cannot be substituted for the United States, as defendant, after the statute of limitations on refund suits has run. *Hammond-Knowlton* v. *United States*, 121 F. 2d 192 (2d Cir., 1941), cert. denied 314 U.S. 694; *Adler* v. *Nicholas*, 166 F. 2d 674 (10th Cir. 1948).

If the action is brought in a particular judicial district which happens to suit the convenience of the Government, as where the evidence and principal witnesses are located, the question of venue might not be raised. Unless the defendant raises the issue of venue there is no problem; the Supreme Court stated in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167 (1939), that:

> The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation, relates to the convenience of litigants and as such is subject to their disposition.

Limiting suits against the United States by corporate plaintiffs to the state of their incorporation does not really present an acute procedural problem. Few plaintiffs have as wide a choice of forum as does the tax litigant. He can choose the Tax Court, the Court of Claims or the District Court. In the District Court, one may sue the United States at the place where the taxpayer resides or the District Director at the place where the Director resides. In the Tax Court, concurrently with filing the petition, the taxpayer files a request for designation of the place of hearing on the merits; this request is ordinarily granted at any of the designated places for Tax Court trial. Rule 26 (a), Rules of Practice Before the Tax Court of the United States. The Court of Claims, unlike the Tax Court, does not travel from Washington, but at the convenience of the litigants, hearings before Commissioners are heard at designated places throughout the United States.

A limiting of suit to the state of incorporation may deny to some corporate taxpayers effective use of the broadened Section 1346(a). However, the construction of Section 1391(c) sought in *Albright & Friel, Inc., supra*, would permit suit wherever the corporation does business and thus permit "forum shopping" at the trial and appellate level by large corporate taxpayers to an almost unlimited extent, an advantage not available to other classes of taxpayers. The controlling consideration over the place where judicial authority, otherwise granted, is to be exercised, is said to be the *convenience of the litigants. Neirbo Co.* v. *Bethlehem Shipbuilding Corp., supra*. This means the convenience of the defendant as well as plaintiff. It may well be that limiting suit to the place of incorporation is too narrow, and perhaps the place where the return is filed, the tax is paid, or the principal place of business is located should be considered the corporate residence. Possibly there should be an amendment of Section 1402(a) allowing removal of a case to another district when the ends of justice required it. (28 U.S.C. §1404 (a) allows a change of *venue* for convenience of the parties and witnesses to any other district or division "where it might have been brought".) But unlimited choice of venue would not seem to be either necessary or desirable.

The views expressed herein are those of the author and do not necessarily represent views of the Internal Revenue Service.

The President's Page

(Continued from page 3)

has, in a personal letter to Mr. Economos, recognized the outstanding service by your Association's Committee in this field. Under date of October 29, 1956, the President wrote Mr. Economos as follows:

> It has been encouraging to learn of the success achieved by the four regional traffic safety conferences in enlisting support for our program of organized citizen action against traffic accidents.
>
> The planning, staffing and carrying out of these conferences was a job of such size and nature that it would not easily have been accomplished without the knowledge, experience and specialized talents which you and your organization contributed.
>
> Please accept my thanks and congratulations for your effective help in this major effort to save lives on our streets and highways.

State and local bar associations can do much to implement this program. For example, the Waco-McLennan County Bar Association of Texas recently prepared and distributed a pamphlet entitled "Your Rights in Traffic Court". This is the first one of this nature which a bar association has developed, although many similar pamphlets have been used and distributed by traffic court judges. The advantage of the bar association pamphlet is that it can give more information and at the same time do a public relations job for the entire profession.

Our hats are off to Waco-McLennan County! Let's hope that other bar associations on the state and local level will follow its lead.

BAR ACTIVITIES

Charles Ralph Johnston • Editor-in-Charge

Horace F. BLACKWELL, Jr.

■ The Diamond Jubilee meeting of The Missouri Bar was held in St. Louis on October 4-6, with President Rush H. Limbaugh, of Cape Girardeau, presiding. The association was organized December 30, 1880, and became the Missouri Bar, Integrated in September, 1944. It has a present membership of 6,839.

The newly elected officers are Horace F. Blackwell, Jr., of Kansas City, President; Harry Gershenson, of St. Louis, Vice President; and Clarence O. Woolsey, of Springfield, Secretary. H. S. Rooks, of Jefferson City, was re-elected Executive Director.

Honored guests at this annual meeting were three presidents of adjoining state bar organizations, namely, R. R. Bateson, of The Iowa State Bar Association; Wilber S. Aten, of the Nebraska State Bar Association; and Clarence Kolwyck, of The Bar Association of Tennessee.

In his annual address at the opening session of the meeting and in a comprehensive report prepared for the Supreme Court of Missouri, for the Board of Governors and members of the Bar, President Limbaugh covered in detail the activities of the past seventy-five years and the current conditions of The Missouri Bar. He reported that the Board of Governors, on September 21, had passed a motion asking the Supreme Court to amend its rule, increasing annual bar enrollment fees from $15.00 to $25.00 per year. The Court has not yet acted on the recommendation.

Mr. Limbaugh's report shows that, like many other bar associations, The Missouri Bar has become public-relations conscious. In 1955, The Missouri Bar spent $14,945 on its public relations program, including the salary of a public relations specialist who is not a lawyer. In 1956, the Public Relations Committee requested $21,425, but the Board of Governors was forced to limit the appropriation to $16,590, and it appointed a special committee to examine ways and means of financing an expanded public relations program and other essential activities. That special committee obtained some interesting figures on the public relations programs of other bar associations. In Illinois, where the state bar association dues are $25 annually, the appropriation for public relations in 1954 was $15,000, of which $5,336.84 was spent. In 1955, Illinois appropriated $10,500 and spent $8,064.47. In 1956, the appropriation was $6,000 and at the end of three fourths of the year, some $3,700 had been spent.

The Nebraska State Bar Association first engaged a public relations counsel who was not a lawyer. Finding this unsatisfactory, they made a public relations survey to determine what course to take in this field. Pending the results of the survey, the program is under the direction of the secretary of the Bar, who is also clerk of the Supreme Court of the State. The Ohio State Bar Association spends about $14,000 annually on public relations, largely for the distribution of pamphlets, movies, the printing of newspaper columns, awards to newspapermen and newspapers. The $14,000 includes part of the annual salary of an assistant secretary. The Florida Bar spends about 5 per cent of its income on public relations. Its program presently is conducted by the executive director, who also edits the *Florida Bar Journal.*

The special committee's study indicated that in most state bar associations, the public relations program is headed by a competent public relations director who is also in many instances the editor of the state bar journal.

The first day of the meeting was devoted to a labor law institute, featuring addresses by John R. Stockham, of St. Louis, Harry H. Craig, of St. Louis, Professor Elmer E. Hilpert, of Washington University School of Law. John H. Martin, of St. Louis, presided at the morning session and Harry L. Brown, of Kansas City, at the afternoon session. Participants in the panel discussions that followed each address included Carl E. Enggas, Robert S. Fousek, Austin Francis Shute, Marion Beatty, all of Kansas City; Dan J. O'Leary, of Joplin; and Milton O. Talent, of St. Louis.

An evidence symposium was presented at which Orville Richardson, of St. Louis, presided. The principal address was delivered by Professor Edmund M. Morgan, of Vanderbilt University School of Law, former Acting Dean and Professor of Law at Harvard University. Other speakers were Charles Carr, Ben Swafford, both of Kansas City; Justin Ruark, Judge of the Court of Appeals, and Paul Barrett, Commissioner of the Supreme Court of Missouri.

The first general session of the meeting was held with President Limbaugh presiding. Since this was the Diamond Jubilee Meeting of the Association, the three addresses appropriately were entitled: "The Missouri Bar in Retrospect", by William R. Gentry, of St. Louis; "The Missouri Judiciary", by George H. Moore, Judge of the United States District Court; and "The Future of the Legal Profession: Broad Horizons Ahead for Missouri Lawyers", by Richmond C. Coburn, of St. Louis.

The second general session was addressed by Joseph Trachtman, of New York City, on "What the Gen-

eral Practitioner Must Know About Estate Planning", followed by a panel discussion, and by Harold L. Reeve, of Chicago, who spoke on "Lien Priority: Those Troublesome Federal Tax Liens". Following Mr. Tractman's address, there was a panel discussion in which Peter H. Hubsch, George S. Roudebusch, and Henry Lowenhaupt, all of St. Louis, and Bertram W. Tremayne, Jr., of Clayton, took part. A panel discussion also followed Mr. Reeve's address in which Wayne Bigler, D. Calhoun Jones, John Arnold and Harry S. Gleick, all of St. Louis, and Herbert W. Ziercher, of Clayton, participated.

President Limbaugh in his annual address recalled several interesting bits of the history of The Missouri Bar. Several Missourians joined in the movement which culminated in the organization of the American Bar Association, and James O. Broadhead, of St. Louis, was its first President. He was followed at intervals by Henry Hitchcock, James Hagerman, Frederick W. Lehmann, Guy A. Thompson and Jacob M. Lashly. Every one of these six was from St. Louis.

The Missouri Bar over the years has co-ordinated its efforts with those of the numerous local bar organizations throughout the State of Missouri, many of which have achieved recognition for outstanding service. The Bar Association of St. Louis received the American Bar Association Award of Merit in 1956 and honorable mention in 1955. The Junior Section of The Bar Association of St. Louis has received parallel awards from the American Bar Association. The widely known and copied Missouri Plan for placing the selection of judges upon a truly nonpartisan basis is one of the greatest single contributions made by any bar association to the improvement of our American judicial system. Thus it is clear that the Missouri Bar always has been in the forefront of organized bar activities during the whole of its seventy-five years of existence.

Barton H. KUHNS

■ The Fifty-seventh Annual Meeting of the Nebraska State Bar Association was held in Omaha on October 17-19, with a near record attendance of 831. President Wilber S. Aten, of Holdrege, presided. The House of Delegates met on October 17 to receive and act upon all committee reports from standing and special committees of the Association.

Speakers at general sessions were David F. Maxwell, President of the American Bar Association, who addressed the luncheon meeting on October 18, and Lt. General John Wilson O'Daniel, of New York, who spoke at the Annual Dinner on "Communism in Southeast Asia".

The Section on Real Estate, Probate and Trust Law had as its principal speaker Paul E. Basye, Professor of Law at Hastings College of Law, and a member of the Burlingame, California, Bar. Mr. Basye's address on "Improvements in Conveyancing Procedure" was followed by a general discussion of standards for title examination.

The program of the Section on Practice and Procedure featured a talk by Charles C. Scott, of Kansas City, Missouri, on "The Preparation and Presentation of Photographic Evidence". The balance of the program of the Section consisted of a panel discussion of "Trial Procedure from the Judicial Standpoint". Panel moderator was Lowell C. Davis, of Sidney. Participants were John W. Yeager, of Lincoln, Judge of the Supreme Court of Nebraska, and District Judges Harry A. Spencer, of Lincoln, Edmund Nuss, of Hastings, and John H. Kuns, of Kimball.

The program of the Section on Insurance Law included addresses by Joseph P. Cashen, of Omaha, formerly a judge of the Nebraska Workmen's Compensation Court on "Some Problems of Subrogation in Workmen's Compensation" and by J. Edward Day, of Newark, New Jersey, Assistant General Counsel of Prudential Insurance Company of America, on "The Disability Clause".

Speakers before the Section on Municipal and Public Corporations were Winthrop B. Lane, of Omaha, on "Some Phases of Municipal Bond Law" and Raymond E. McGrath, of Omaha, on "Zoning".

The Section on Taxation had as speakers Joseph T. Votava, of Omaha, former United States District Attorney, who discussed "Procedure in Tax Fraud Cases", and Laurens Williams, of Omaha, presently serving as Assistant to the Secretary of the Treasury, whose topic was "Your Future Income Taxes".

The Junior Bar Section discussed the results of a recent survey of the economic condition of the Bar and adopted a resolution favoring the adoption of a uniform minimum fee schedule of statewide application.

Barton H. Kuhns, of Omaha, is the newly elected President of the Association and C. Russell Mattson, of Lincoln, was elected as a member at large of the Executive Council. Other new members of the Executive Council are Judge Harry A. Spencer, of Lincoln, and Paul H. Bek, of Seward.

■ The National Legal Aid Association Field Service Letter for December, 1956, contains an interesting review of the activities of the Association during 1956.

An impressive list of articles published during the year shows the conscientious functioning of the various legal aid committees, groups and societies throughout the country. There still are a number of large cities where the legal aid program is sadly needed. A list of typical and useful articles on several phases of legal aid work published in various law reviews and bar association journals is included.

The National Legal Aid Association and the American Bar Association's Standing Committee on Legal Aid Work have made available several additional aids for stimulating interest and encouraging activity in promoting better legal aid facilities. These may be obtained from the headquarters office of the NLAA:

1. A 16 mm. color film, running 21 minutes—"The Story of Legal Aid". This film describes the services of a Legal Aid office, shows how it aids the low income group of the community and how it brings good public relations to the organized bar. ($3.50—cost of handling)
2. Two new publications—"Legal Aid in Smaller Communities" and "Solicitation of Law Firms and Lawyers for Legal Aid"—free. Other pamphlets available free are: "Why Legal Aid in Your City", "A 12 Point Brief for Legal Aid", "Laws Are for Everyone", "The Legal Aid Handbook".
3. A three-dimensional, four color, window display, showing Legal Aid as a community service sponsored by the lawyers, suitable for exhibits featuring the public services of the Bar Association. (Sale price at cost: $10.00)
4. A 40 page special NLAA Convention (November, 1956) issue of *Legal Aid Brief Case* (free).
5. Speakers furnished for meetings of bar associations; Field visits by NLAA staff lawyers to meet with local committees on Legal Aid matters; Surveys on local Legal Aid organizations in co-operation with bar associations to aid in evaluating and measuring services.

It is interesting to note the number of new developments for legal aid promotion in 1956. One is lawyers' wives organizations, of which there are some twenty local chapters in California. Many of them have adopted legal aid as their project, including the giving of secretarial help as well as financial assistance. Among these are Los Angeles, Oakland, Long Beach and Pasadena.

Junior League groups have continued their voluntary services in many communities. The national office of Junior Leagues of America is encouraging local chapters to provide volunteers for legal aid societies.

The American Bar Association Assembly resolutions seek to encourage local bar associations to step up their efforts to develop defender services for indigent defendants and to consider ways for providing counsel for those convicted where it appears there may have been a miscarriage of justice. William T. Gossett, Chairman of the American Bar Association's Standing Committee on Legal Aid Work, has written to all presidents of local bar associations and is receiving many replies promising co-operation.

A new Bar Association Legal Aid Exhibit—a lighted display—for use at meetings of bar associations, now is being prepared. Requests for this display usually come from state and American Bar Association annual meetings. Free literature is made available and NLAA staff members will be present for questions when the display is used.

The NLAA and the American Law Student Association are conducting a survey of the various law schools to determine the number and nature of student clinics now being operated. *The Student Lawyer Journal* carried an article in the December issue describing the clinics and giving other information which will be helpful in establishing clinics where none exist.

We suggest that any association or committee interested in establishing a legal aid program or in learning the recent developments in this field can do no better than to write to the National Legal Aid Association, American Bar Center, 1155 East 60th Street, Chicago 37, Illinois, to obtain a copy of this December, 1956, National Legal Aid Association Field Service Letter and any of the other helpful aids provided by the NLAA.

■ The following article from the *Virginia Bar News* for December, 1956, edited by Hardy C. Dillard and R. E. Booker, both of Richmond, should be read and remembered by every member of the Bench and Bar. Unbelievably, many of us are unaware of the lawyer's duty to defend unpopular causes; and too few of us have the courage or will make the effort necessary to acquaint our clients, friends and the public with this imperative duty. Too many of us are prone to take a holier than thou attitude toward the lawyer who represents persons charged with crime, or those involved in marital difficulties, or who from the nature of other charges against them are unpopular. It is indeed gratifying to note from this editorial that the lawyer of courage and high principle who is willing to suffer public misunderstanding and opprobrium to preserve the right of every person to adequate legal representation and a fair trial is not an extinct breed.

The Virginia Bar News said:

On two highly publicized occasions in the past few months the lawyer's duty to defend unpopular causes has been the object of misunderstanding and challenge. In both instances the attitude of the American Bar Association was influential in upholding the twin principle that every defendant has a right to the benefit of counsel and that a client's views and reputation are not to be imputed to his counsel.

The first instance was occasioned by a four months Smith Act trial in Cleveland involving ten alleged Communists. The Cleveland Bar Association raised $25,000 to pay expenses and adequate compensation for the indigent defendants. This act of high principle elicited from an Assistant Attorney General of the U. S. the remark that the bar groups were "dupes" and that the Communists "were laughing at these guys who defend them." The Cleveland Bar Association was so angered by these reported remarks that it was prepared to file a complaint against the Assistant Attorney General directed to the American Bar Association grievance committee. It abandoned this plan only upon a disavowal of the remarks. The President of the Cleveland Bar took occasion to say:

"The defense of an unpopular cause is not an easy task. Those who perform such tasks should be thanked and not blamed for keeping alive in the United States the constitutional tradition that every man should have a fair trial. The justice department is the last branch of our government which should attack the bar for doing its patriotic duty."

The second occasion concerned Judge Bigelow's confirmation to the Board of Governors of state-con-

trolled Rutgers University. Opposition to Bigelow centered on the fact that, as an attorney he had once represented, at the request of the Essex County (N.J.) Bar Association, a school teacher who had pleaded the Fifth Amendment before the U. S. House Committee on Un-American Activities. The New Jersey State Senate's confirmation of Bigelow was undoubtedly aided by the storm of protest voiced by bar groups and by the wide publicity given to the American Bar Association's resolution of 1953 announcing the twin principles noted earlier in this article.

Henry F. BLACK

■ The Vermont Bar Association held its 79th Annual Meeting at Manchester on September 21-22. President R. Clarke Smith, of Rutland, presided over the two business sessions and the annual dinner at which former Governor James F. Byrnes, of South Carolina, was the principal speaker.

New officers are Henry F. Black, of White River Junction, President; Sterry R. Waterman, of St. Johnsbury, First Vice President; Leon D. Latham, of Burlington, Second Vice President; and John J. Finn, of Barre, Third Vice President. Regrettably, Mr. Finn passed away shortly after election. Lawrence J. Turgeon, of Middlesex, was re-elected Secretary. Phyllis W. Page, of Burlington, was elected Treasurer. The new Board of Managers consists of the above named officers, together with R. Clarke Smith, of Rutland, immediate past president; Clifton G. Parker, of Morrisville; A. Luke Crispe, of Brattleboro; and Charles F. Ryan, of Rutland. J. Boone Wilson, of Burlington, was re-elected the Delegate of the Vermont Bar Association to the House of Delegates of the American Bar Association.

The Vermont Bar Association has a rather small number of lawyers from which to draw its members; nevertheless its membership is 410. Most active are its Committee on Practice, Procedure and Court Organization, the Professional Conduct Committee, and the Seminar Committee. The Junior Bar Committee also shows promise of becoming very effective. The Association adopted resolutions recommending legislation legalizing the use of recording devices in the municipal courts; recommending legislation extending the rule-making power to the Supreme Court and the Superior Courts; recommending the adoption of the Uniform Security Act; and recommending the enactment of the Jenkins-Keogh Bill.

The Professional Conduct Committee is a busy and effective committee and does an excellent job of policing the members of the association.

The Seminar Committee provides for the continuing legal education of Vermont lawyers. Two programs were arranged during the year: In March a joint meeting of the Association with the Vermont Medical Society was held; a demonstration of the proper presentation of expert medical testimony was followed by a panel discussion on the subject of co-operation between the two professions. The second seminar, held during the annual meeting, presented a discussion of automobile negligence cases from the insurer's point of view.

In his annual address, President R. Clarke Smith reviewed the problems and achievements of the Association during the past year. As to the question of federal court congestion, Mr. Smith said that he thought the only solution was more judges. He added that at the present time, notwithstanding an increase in litigation in the federal district court for the State of Vermont, the docket is up to date and cases are disposed of as promptly as the parties desire. Speaking of the problems of judicial selection, and especially those arising in connection with the appointment of a judge by the Governor to fill a portion of a term, President Smith pointed out that it would be highly desirable if early in every Governor's term a conference could be held between the Chief Justice of the Supreme Court, the President of the Vermont Bar Association, the Chairman of the Association's Committee on Selection of Judges, and the Governor, to ascertain what, if any, assistance could be given to the Governor by the Bench or Bar in the event that a judicial vacancy should occur.

The President also reported that he had attended a series of meetings which culminated in a joint meeting of the Board of Managers of the Association and the Board of Governors of the Vermont Medical Society, at which it was voted to attempt to formulate an inter-professional code along the lines of those already adopted in Wisconsin and several other states. Copies of a proposed draft of such a code were distributed, and the members attending were urged to study it and to present their suggestions.

Former Governor James F. Byrnes, in his address before the annual dinner, explained the Southern view of the recent *School Segregation* decisions of the Supreme Court. He declared that "the decision has undone all that was accomplished in half a century by the leaders of the two races in promoting better relations. Confidence and co-operation have been displaced by suspicion and fear. Instead of improving, the situation is worsening.... Guns and bayonets can force submission of the people, but cannot promote education or inspire the sympathy and respect without which white and colored persons cannot live peacefully and happily in any community."

Mr. Byrnes deplored the failure of the Supreme Court to follow the doctrine of *Plessy* v. *Ferguson* and its citation of and reliance upon Gunnar Myrdal's *An American Dilemma*, declaring that some of the

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OUR YOUNGER LAWYERS

Kirk M. McAlpin, Secretary and Editor-in-Charge, Savannah, Georgia

■ On November 2, 3 and 4, 1956, the new officers and directors of the Conference met at the Hotel Commodore, New York City, to review the proposed programs of the Conference Committees for 1957, to outline its objectives for the ensuing year, and to make plans for the Midwinter Meeting of the Council to be held in Chicago on February 15, 16 and 17, 1957, the Denver Regional Meeting May 9, 10 and 11, 1957, and the Annual Meeting in New York City on July 12, 13, 14 and 15, 1957. In attendance were Chairman William C. Farrer, of Los Angeles; Vice Chairman Bert H. Early, of Huntington, West Virginia; Secretary Kirk McAlpin, of Savannah; Personnel Director W. Reece Smith, Jr., of Tampa; Information Director Gibson Gayle, Jr., of Houston; Professional Director A. D. Van Meter, Jr., of Springfield, Illinois; and Services Director Calvin H. Udall, of Phoenix.

Objectives for 1957

Chairman Farrer emphasized that the Conference's primary objectives included efforts to integrate the 14,000 new members of the Conference; to improve our liaison with the state and local Junior Bar units; a concerted campaign for enactment into law of the Jenkins-Keogh Bills and similar legislation providing retirement benefits for the self-employed; an analysis of the structure of the Conference to determine necessary changes in our organization in view of the increased participation and membership; and finally, to encourage adoption by our affiliated units of recommended committee programs, particularly those on public information, traffic courts, the curbing of unauthorized practice of law, medico-legal co-operation and, as always, membership.

Chief Justice Vanderbilt Meets with Conference Officials

On Saturday, November 3, Chief Justice Arthur T. Vanderbilt of the New Jersey Supreme Court, a former President of the American Bar Association, met with the officers and directors concerning the feasibility of the Conference's undertaking as a project for 1957 a fact-finding survey on traffic courts in each state. Ultimately it is hoped to initiate measures to implement the enactment into law of the sixteen resolutions on traffic safety, which were unanimously adopted in 1951 and 1952 by the Conference of Chief Justices and likewise approved by the Conference of Governors. The plan outlined by Chief Justice Vanderbilt was enthusiastically received and is being referred to the Executive Council of the Conference for action at its Midyear Meeting.

Annual Meeting Talks

In formulating plans and making arrangements for the annual meeting to be held in New York, informal talks were had with several Conference members from New York City and New Jersey who will have a major role in handling the local arrangements for that meeting, among whom were Dick Manning, John Hunt, Gary Jewitt, James J. Ward, Jr., Bob Bjork, Dick Edmondson, Bill Cantwell, Donald Maroldy, James Adler, George Dwight and Jules Haskell and others, of New York City and Frank Brennan, of Newark, New Jersey, and Adrian M. Foley, Jr., of Jersey City, New Jersey.

Chairman Farrer's Travels

Conference Chairman Bill Farrer was able to meet many Conference leaders and officials of the American

Officers and directors of the Junior Bar Conference meet with Chief Justice Arthur T. Vanderbilt of the New Jersey Supreme Court in New York to discuss conference support of the resolutions of the Conference of Chief Justices on Traffic Safety. Left to right Kirk M. McAlpin (Savannah, Georgia), J. B. C. Secretary; Gibson Gayle, Jr. (Houston, Texas), J. B. C. Information Director; Calvin H. Udall (Phoenix, Arizona) J. B. C. Services Director; Chief Justice Arthur T. Vanderbilt; William C. Farrer, J. B. C. Chairman (Los Angeles, California); A. D. Van Meter, Jr. (Springfield, Illinois), J. B. C. Professional Director; William Reece Smith, Jr. (Tampa, Florida), Personnel Director; Bert H. Early (Huntington, West Virginia), J. B. C. Vice Chairman.

Bar Association while en route from California to the New York directors' meeting by arranging his itinerary to allow for a series of stop-offs. Starting October 25 at Denver, he had conferences with Robert B. Keating, Chairman of the Traffic Courts Committee, in regard to the forthcoming vigorous campaign to be waged for the Visitor–Violator Program, and with Vernon T. Reese, Jr., Chairman of the Unauthorized Practice Committee, and Jack Verne Temple, Chairman of the Colorado Junior Bar. He spent a busy three days in Chicago, having conferences on medico-legal co-operation with C. Joseph Stetler, Director of the Law Department of the American Medical Association; with James McClure, Chairman of the Younger Members' Section of the Chicago Bar; with John R. Nicholson, Vice Chairman of the American Bar Association Committee on Retirement Benefits, lining up JBC participation in the Jenkins-Keogh Campaign; with Mrs. Helen Lovelace, who is handling arrangements for New York and London hotel accommodations and Annual Meeting plans; and John McNulty, President of the A.L.S.A. and the members of his Executive Committee. On October 27, he conferred with members of the Board of Governors of the Association and also attended the meeting of the Special Committee on Reorganization of the Conference; and on October 28, he attended the meeting of the Section Chairmen.

The following day, Mr. Farrer conferred in Detroit with George Freeman, Chairman, Michigan JBC, William M. Saxton, Chairman of the Public Information Committee, and K. Douglas Mann, past chairman of the Michigan JBC. From there, he went to Washington, D. C., where he met with James J. Bierbower, Chairman of the Military Services Committee; Miss Charlotte P. Murphy, editor of the *Young Lawyer*, and her staff; and Paul R. Madden, District of Columbia Councilman, regarding the Committee on Retirement Benefits. In Baltimore, he had further discussion of retirement benefits with Walter R. Tabler, Jr., Chairman of that Committee, after which he went on to New York for the directors' meeting.

Conference Begins Work on Retirement Benefit Legislation

Another feature of the directors meeting in New York was the appearance of Walter R. Tabler, Jr., of Baltimore, who has been appointed Chairman of the Junior Bar Conference Liaison Committee of the Jenkins-Keogh program.

Mr. Tabler first reported as to the contents and effect of the principles embodied in Jenkins-Keogh type legislation. He stated that it would enable self-employed persons to save a portion of their income each year in such a manner as to have federal taxes thereupon deferred until the members' retirement. At that time, they would presumably be in a lower tax bracket and the amount of taxes payable on the income previously set aside would be lower. In substance, it would permit those who work for themselves to have tax equality with those who work for others and are a part of corporate retirement plans.

In establishing the procedure under which his committee will work, Mr. Tabler reported that Chairman Farrer had already appointed Circuit co-chairmen, one from each major political party, who will be responsible for continuing and supervising the activities in those states composing each respective Circuit. One, two or more local co-chairmen are to be designated, depending upon whether any given area has a particular need for bi-partisan or geographically diversified representation, for each of the states within their circuits, whose responsibility will be to determine the sentiment of both of the Senators and all of the Congressmen from his respective state regarding Jenkins-Keogh legislation. Lists of all members of Congress favoring the legislation are to be sent through the Circuit Chairmen to Mr. Tabler, who will be in constant contact with Loyd Wright and John R. Nicholson, Chairman and Vice Chairman of the American Bar Association's Committee on Retirement Benefits.

In those instances in which a Senator or Congressman may have indicated uncertainty or a lack of enthusiasm toward a retirement benefit program similar to the one originally introduced by the Jenkins-Keogh Bill, each Circuit and State Co-Chairman is asked to make a concerted effort to familiarize him with the merits of the proposed legislation, either by direct interviews or by encouraging persuasive mailings from his constituency.

Mr. Tabler expressed the hope that by the time of the Midyear Meeting in Chicago, an accurate tally of the new Congress will indicate that a majority of both Houses are in favor of this program. He cautioned that this can be acomplished only if the members of the American Bar Association begin at once to contact the members of Congress from their respective districts and seek to prevail upon them to support this type of legislation once it is introduced in the 85th Congress.

Hawaii Junior Bar Section Elects Lum

At the Annual Meeting of the Junior Bar Section of the Bar Association of Hawaii, held on Wednesday, October 31, at the Supreme Court, the following officers were elected for 1957: President, Herman Lum; Vice President, Donald Ching; Secretary, Richard Lo; Treasurer, Frederick Rohlfing; Directors, Daniel Case, Daral Conklin and Harry Tanaka, all of Honolulu.

The Junior Bar Section of Hawaii has had an outstanding program for 1956, under the able leadership of C. Frank Damon, Jr., of Honolulu, immediate past president.

The Section published an excellent *Newsletter*, which kept all members informed of all events, committee activities, etc., and its well-organized committee system undertook a number of worthwhile projects. Particularly worthy of mention was the work of the Program Committee under Eichi Oki, which included a re-

ception given on June 15, honoring the eleven attorneys admitted to practice in May; a luncheon on August 24 honoring Judge Luther W. Youngdahl, Judge of the United States District Court for the District of Columbia and former Governor of Minnesota, who spoke on the *Lattimore* case; a luncheon on September 19, at which Associate Justice Masaji Marumoto, the guest speaker, reported on the August meeting of the American Bar Association at Dallas, which he had attended. The Continuing Legal Education Committee, whose Chairman was Donald Iwai, presented programs on "Problems Confronting the Attorney in Organizing a Corporation", "Representing Persons Charged with Criminal Offenses Prior to Trial: Arrests, Habeas Corpus, Bonds, Arraignment, etc." and "Divorce, Separation, Annulment, Property Settlements and Other Aspects of Domestic Relations Law". The Public Information Committee, chairmanned by Daral Conklin, was, among other things, working with the Committee of the Senior Bar in organizing a Speakers' Bureau; publication of a series of articles on legal topics to appear in local newspapers; study of legal subjects on radio and TV programs with a view to local sponsorship; and publicity releases to the newspapers on Junior Bar activities.

An unusual feature was a panel discussion, sponsored by the Section, relating to the study and practice of law, which was open to any person interested in entering the profession, including law students. Short talks were given on pertinent subjects, after which a question and answer session lasted until late in the evening. Topics covered were: "How To Study Law and Take Law Examinations", "Territorial Bar Examination Requirements", "Private Practice", "Government Practice", "Hawaii's Rules of Civil Procedure" and "Legal Ethics".

Leaders in Association's Successful Membership Campaign

▪ Last year's historic American Bar Association membership campaign was a "team" effort in which almost ten thousand lawyers, in practically every city and town in the United States, were active participants.

The Journal's account of the campaign, published in the August issue, included the names or photographs of the state and metropolitan area chairmen whose organizations succeeded in reaching or exceeding their new member quotas. As of June 30, the number of new member applications received stood at 31,331. At the Annual Meeting of the Association in Dallas, in late August, the Membership Committee under the chairmanship of Cecil E. Burney, of Corpus Christi, Texas, was able to report to the Board of Governors and the House of Delegates that the final total of new applications had reached 33,290. As of November 7, the Association had received 33,647 applications, of whom 30,380 had been elected to membership.

In this issue we are publishing the complete list of local chairmen, by states, as furnished to the Journal by the membership campaign office whose jurisdictions reached or topped their quotas in the campaign. In the list are the names of more than 900 lawyers whose voluntary effort contributed much to the success of the campaign and made it possible for the Association to achieve by far the highest membership mark in its history.

Alabama

John E. Adams, Grove Hill
Henry C. Berry, Selma
Ed Brogden, Andalusia
T. Eugene Burts, Jr., Florence
J. Pelham Ferrell, Phenix City
Ralph D. Gaines, Jr., Talladega
Grady W. Hurst, Jr., Chatom
Jesse A. Keller, Florence
Richard E. McPhearson, Butler
Jacob A. Walker, Jr., Opelika
George F. Wooten, Talladega

Arizona

Guy Anderson, Safford
Jack M. Anderson, Flagstaff
Thaddeus G. Baker, Yuma
T. J. Byrne, Prescott
Frank X. Gordon, Kingman
Frank X. Gordon, Jr., Kingman
Bryant W. Jones, Yuma
Frances M. Long, Safford
James R. Mallott, Jr., Globe
Henry C. McQuatters, Flagstaff
James M. Murphy, Tuscon
Jack L. Ogg, Prescott
Robert C. Stubbs, Tucson
David B. Udall, Tucson

Arkansas

Bolivar L. Allen, El Dorado
Knox B. Kinney, Forrest City
Stephen A. Matthews, Pine Bluff
Richard B. McCulloch, Jr., Forrest City
Fred M. Pickens, Jr., Newport
William I. Prewett, El Dorado
Louis L. Ramsay, Jr., Pine Bluff
Marvin D. Thaxton, Newport

California

James K. Abercrombie, Visalia
Irving P. Austin, Compton
Ardene D. Boller, Arcadia
Harold B. Cooper, Temple City
Arch E. Ekdale, San Pedro
Frank F. Forve, Hawthorne
Richard J. Gibson, Stockton
F. F. Gualano, Monterey Park
Joseph L. Joy, Fresno
Francis W. Halley, Modesto
Leo V. Killion, San Rafael
Forrest E. Macomber, Stockton
Burnett K. Maxwell, Jr., Paramount
E. Warren McGuire, San Rafael
Emery F. Mitchell, Eureka
Ellis R. Randall, Vallejo
Clayton O. Rost, Eureka
Vernon D. Spencer, Inglewood
Russell P. Taft, Vallejo

Colorado

Harper L. Abbot, Pueblo
Frank D. Allen, Akron
Duane L. Barnard, Granby
John M. Boyle, Salida
Neil L. Carleton, Sterling
Victor F. Crepeau, Montrose
Harry F. Claussen, Glenwood Springs
John R. Clayton, Greeley
Orrel A. Daniel, Brighton
Clyde T. Davis, LaJunta
William O. DeSouchet, Jr., Alamosa
Graydon F. Dowis, Sterling
Edgar Lee Dutcher, Gunnison
George A. Epperson, Fort Morgan
Lawrence L. Fenton, Rocky Ford
William W. Gaunt, Brighton
Kenneth W. Geddes, Colorado Springs
Ralph B. Harden, Fort Collins
George A. Holley, Wheat Ridge
R. M. McCreary, Loveland
Joseph F. Nigro, Trinidad
Bernard P. O'Kane, Lakewood
Harry S. Petersen, Pueblo

George J. Petre, Glenwood Springs
Richard H. Simon, Englewood
Edwin Humes Stinemeyer, Canon City
William R. Stinemeyer, Canon City
Leonard V. B. Sutton, Denver
Samuel S. Telep, Greeley
George E. Trim, Brush
Warren L. Turner, Grand Junction
James E. Turre, Englewood
Charles S. Vigil, Trinidad
Anthony W. Williams, Grand Junction
Lindsay R. Wingfield, Boulder
Mack Witty, Salida
Keith H. Zook, Boulder

Connecticut

Robert P. Burns, Torrington
Philip M. Dwyer, Willimantic
Harry S. Gaucher, Jr., Willimantic
Etalo G. Gnutti, Stafford Springs
Harry H. Lugg, Rockville
Thomas F. Wall, Torrington

Delaware

Arthur D. Betts, Georgetown
Herman C. Brown, Dover
Charles F. Daley, Jr., Wilmington
Walter D. Ford, Wilmington

Florida

William A. Foster, West Palm Beach
W. Dayton Logue, Panama City
Larry G. Smith, Panama City
Grant E. Wenkstern, Fort Lauderdale

Georgia

Marvin A. Allison, Lawrenceville
Hilliard P. Burt, Albany
William Butt, Blue Ridge
William O. Carter, Hartwell
Claude Christopher, Griffin
Scott S. Edwards, Jr., Marietta
Thomas F. Green, Jr., Athens
Henry J. Heffernan, Augusta
G. Conley Ingram, Marietta
Hamilton McWhorter, Lexington
J. D. Maddox, Rome
W. W. Mundy, Jr., Cedartown
A. N. NeSmith, Cochran
Robert Claude Norman, Augusta
H. H. Perry, Jr., Albany
Emory F. Robinson, Gainesville
Alan F. Rothschild, Columbus
Robert H. Smalley, Jr., Griffin
Oscar M. Smith, Rome
Sidney O. Smith, Jr., Gainesville
Will Ed Smith, Eastman
Cubbedge Snow, Macon
Cubbedge Snow, Jr., Macon
Albert W. Stubbs, Columbus
Jones Webb, Lawrenceville
Glenn T. York, Jr., Cedartown

Idaho

Harry Benoit, Twin Falls
Reed Clements, Lewiston
Joseph Ray Cox, Jr., Coeur d'Alene
Paul B. Ennis, Boise
William F. Gigray, Jr., Caldwell
William S. Hawkins, Coeur d'Alene
William S. Holden, Idaho Falls
Douglas D. Kramer, Twin Falls
Kent E. Lake, Burley
Isaac McDougall, Pocatello
A. H. Nielson, Burley
James E. Schiller, Nampa
William M. Smith, Boise
Elbert A. Stellman, Lewiston
Grant L. Young, Rigby

Illinois

Stephen B. Adsit, Pontiac
Jacob E. Alschuler, Aurora
L. Edward Beckmire, Freeport
John A. Belom, Joliet
Virgil Bozeman, Moline
Robert F. Casey, Aurora
Jewell I. Dilsaver, Mattoon
Harris D. Fisk, DeKalb
Horace B. Garman, Decatur
Norman J. Gundlach, East St. Louis
Thomas M. Harris, Lincoln
Ramer B. Holtan, Freeport
J. Richard Keller, Dixon
James M. McLaughlin, Sullivan
William F. Meehling, Marshall
James R. Parham, East St. Louis
William N. Paris, Charleston
Ortheldo A. Peithman, Farmer City
J. D. Quarant, Elizabethtown
Theodore C. Rammelkamp, Jacksonville
Benjamin H. Redman, Paris
Charles J. Ryan, Jacksonville
John M. Telleen, Rock Island
Robert W. Thomas, Joliet
Harold F. Trapp, Jr., Lincoln
Lloyd J. Tyler, Jr., Aurora

Indiana

Leon D. Cline, Columbus
Carl M. Gray, Petersburg
V. S. McClellan, Mount Vernon
Orville W. Nichols, Jr., Knox
Telford B. Orbison, New Albany
Dixon W. Prentice, Jeffersonville
George A. Rinker, Lafayette
Zane E. Stohler, Winchester
William A. Thorne, Elkhart
William H. Wolf, Greenfield

Iowa

Glenn B. Beers, Waterloo
James E. Bromwell, Cedar Rapids
Erwin L. Buck, Britt
J. F. Casterline, Tipton
Bruce R. Clark, Ida Grove
Thomas M. Collins, Cedar Rapids
Blythe C. Conn, Burlington
Louis L. Corcoran, Sibley
John A. Dailey, Burlington
Edward E. Eaton, Sidney
Wendell T. Edson, Storm Lake
Ben A. Galer, Mount Pleasant
Daniel J. Gallery, Winterset
Stephen C. Gerard, Sigourney
F. Paul Harned, Marengo
C. G. Henneberg, Rock Rapids
John J. Henneberry, Eagle Grove
Roger H. Ivie, Iowa City
Elton A. Johnston, Corydon
A. Scott Jordan, Fairfield
Charles I. Joy, Perry
Gareld Leming, Hampton
Donald Louden, Grinnell
Joseph E. Lynch, Jr., Algona
Ennis McCall, Newton
Isadore Meyer, Decorah
G. A. Milani, Centerville
John E. Nagle, Davenport
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Oliver William Steadman, Cody

Bar Activities

(*Continued from page 81*)

statements in the book were false and "A reflection upon our courts and an insult to our people.... The people of the South respect the Constitution of the United States. Heretofore they have regarded the Supreme Court as its defender. Now they ask themselves—must they be loyal to the Constitution or to the Court? They cannot do both." He declared that "In the segregation decision, the Court did not interpret the Constitution; it really amended the Constitution."

Mr. Byrnes concluded by saying: "The white people of the South are not an alien people. They are loyal Americans. Though they have frequently differed with Democratic and Republican Administrations on domestic issues, they have wholeheartedly supported all administrations in the field of foreign affairs. In four wars they have proved their loyalty and their valor. Now they appeal to you and others like you for understanding as they ask divine guidance in solving this fearful problem."

Bread-and-Butter Materials

Law Office Management. Philip S. Habermann's article on "Law Office Management", which appeared in the June, 1956, issue of The Wisconsin Bar Bulletin and was condensed in the August, 1956, issue of the Journal, has been reprinted as the American Bar Foundation's Reproduction Series No. 1, at 50 cents a copy. Order from the Cromwell Library, American Bar Foundation, 1155 East 60th Street, Chicago 37, Illinois.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • **Editor-in-Charge**

PRACTICAL LAWYER: This department has been most negligent in not calling to the attention of the profession a little magazine published by The American Law Institute, called *The Practical Lawyer*. It came into being in January, 1955, as the brain child of George Wharton Pepper and Harrison Tweed, under the direction of Paul A. Wolkin as editor assisted by an editorial board under the chairmanship of John E. Mulder, and also by the Continuing Legal Education Committee of The American Law Institute collaborating with the American Bar Association. This lets our Association bask in its reflected glory.

To me almost everything that either Senator Pepper or Harry Tweed has ever said or done has a superb touch. In dedicating *The Practical Lawyer* the Senator had this to say about it:

> Somebody, with a flair for sarcasm, has defined a jurist as a man familiar with the laws of all countries but his own. If there is an element of truth in this definition, it is because the student of foreign law is apt to conceive of it as a field for intellectual exercise rather than as a body of principles and rules for the guidance and control of everyday life. On the other hand, the lawyer in active practice knows that the law is something to do as well as to know. He is a fortunate man if he can maintain a just balance between these two aspects of his profession. The practitioner whose chief interest is in the library is at as great a disadvantage as his brother who thinks entirely in terms of the mechanics of the law and depends more upon his familiarity with judges, jurors and clerks of courts than upon his own grasp of legal principles.
>
> This distinction between the Why and the How is in need of emphasis and illustration because some of its implications are less than obvious.
>
> . . . It is with a view to continual emphasis on the importance of the How that the Committee on Continuing Education of the American Law Institute collaborating with the American Bar Association has determined to publish a periodical devoted to the practical aspects of the lawyer's daily work (page 11, Vol. 1, No. 1, January, 1955).

That *The Practical Lawyer* has done so and turned out to be "an educational instrument of real value" as Senator Pepper so confidently predicted, is evident from the following selected articles:

"Informal Procedure Before the National Labor Board" by Ruth Weyand and Norma Zarky, two Washington, D. C., lawyers (Vol. 1, No. 1, January, 1955, pages 31-52).

"Avoiding Antitrust Problems" by John G. Buchanan, Jr., of the Pittsburgh Bar (Vol. 1, No. 2, February, 1955, pages 24-32).

"Tax Problems in Divorce" by Joseph H. Murphy, of the Syracuse Bar (Vol. 1, No. 3, March, 1955, pages 67-73).

"Arrangements under Chapter 11 of the Bankruptcy Act" by W. Randolph Montgomery, of the New York Bar (Vol. 1, No. 4, April, 1955, pages 11-19).

"Bookkeeping for the Small Law Office" by Paul A. Wolkin, the editor, of the Philadelphia Bar (Vol. 1, No. 4, April, 1955, pages 56-80).

"A Law Office System" by Arch M. Cantrall, of the Clarksburg, West Virginia Bar, in collaboration with his firm's bookkeeper, Miss Jaquelyn H. Forlines, in five parts (Vol. 1, No. 5, May, 1955, pages 13-29; Vol. 1, No. 6, October, 1955, pages 27-38; Vol. 1, No. 7, November, 1955, pages 30-43; Vol. 2, No. 3, March, 1956, pages 59-73; and Vol. 2, No. 4, April, 1956, pages 62-73).

"Drafting the Book Publishing Contract" by Allen D. Choka, of the Chicago Bar (Vol. 1, No. 5, May, 1955, pages 64-78).

"The Trial Brief" by Charles W. Joiner, of the Michigan Bar (Vol. 1, No. 6, October, 1955, pages 53-62).

"Taxation of Farmers: Accounting Methods, Records and Returns" by Harry M. Halstead, of the Los Angeles Bar (Vol. 1, No. 7, November, 1955, pages 57-75).

"Shopping Center Leases" by Walter H. Brummund, of the Wisconsin Bar (Vol. 1, No. 8, December, 1955, pages 66-71).

"Atomic Energy Bibliography" supplied by the Los Angeles County Law Library Staff (Vol. 2, No. 1, January, 1956, pages 82-86).

"Reclamation Proceedings" by John E. Mulder, of the Philadelphia Bar (Vol. 2, No. 2, February, 1956, pages 39-52 and Vol. 2, No. 3, March, 1956, pages 49-58).

"Income Tax Problems in the Year of Death" by C. Walter Randall, Jr., and Edward M. David, of the Philadelphia Bar (Vol. 2, No. 2, February, 1955, pages 13-22).

"The Modern Oil and Gas Lease" by George L. Verity, of the Oklahoma Bar (Vol. 2, No. 3, March, 1956, pages 27-48).

"Removal of Civil Actions to the Federal Courts" by Herbert Burstein, of the New York Bar (Vol. 2, No. 4, April, 1956, pages 49-61).

The above gives you a sample of the kind of thing that one finds in *The Practical Lawyer* from which it is evident that Senator Pepper's prediction has come true.

The part that Tweed played in the birth of *The Practical Lawyer* is best told by himself:

> I am its christener. . . . I once wrote a Harvard Law Review article entitled *"Death and Taxes Are Certain but What of Domicile?"* A great many people congratulated me on the title but very few commented favorably on the article itself. So it is probably just as well that I should leave the contents of this magazine to the editors, in whom we all have complete confidence.

But to get back to the name. I am first of all a fisherman so, thinking of Izaac Walton, my predilection was for "The Compleat Lawyer." But that seemed to expect too much of the magazine and to be asking too much of the Bar generally. Then, being something of a sailorman, I remembered "The Practical Navigator" which, a century and a half ago, gave the men of the sea badly needed help in navigation. It was published in 1802, the year before Chief Justice John Marshall handed down the decision in *Marbury* v. *Madison*. Its author, Nathaniel Bowditch, was a Salem boy who learned his navigation the hard way as supercargo on the clipper ships. The book was based entirely on his practical experience and was addressed to practical mariners. Probably every ship in the United States Navy and almost all in the Merchant Marine has a copy of *"The Practical Navigator"* in the locker. We hope that *"The Practical Lawyer"* will be on every practicing lawyer's shelf tomorrow and for at least a hundred and fifty years. [Vol. 1, No. 2, February. 1955, page 11].

Although it hurts me, as an egghead, I agree with Tweed and with Loyd Wright who makes the point that with "new fields of the law" opening before us, "The modern lawyer must be a student of modern legal history" and that "is why *The Practical Lawyer* has come into being" (Vol. 1, No. 3, March, 1955, page 13).

An invaluable feature of *The Practical Lawyer* is the "CLE Calendar" that lists legal symposia by date, place, subject and sponsor. In addition, the Director of the Continuing Legal Education program of the American Law Institute, John E. Mulder, writes a column in each issue discussing the various programs held by bar associations, law schools and various sponsors throughout the country.

The May, 1956, issue of *The Practical Lawyer* was the thirteenth issue of this still relatively new legal magazine. In this short span *The Practical Lawyer* has acquired over sixteen thousand readers among practicing lawyers and the largest paid subscription list of any legal journal except the AMERICAN BAR ASSOCIATION JOURNAL.

To appreciate what an accomplishment this is, compare this circulation with the following law reviews selected at random from the 1956 Directory of N. W. Ayer and Son, of Philadelphia:

American Bar Association Journal	53,992
Harvard	7,500
Columbia	2,964
Texas	2,700
Cornell	2,300
Oregon	2,218
Michigan	2,179
Northwestern	1,700
George Washington	1,700
Pennsylvania	1,650
Virginia	1,650
California	1,130
North Carolina	1,000
Duke (Law and Contemporary Problems)	958
Southern California	935
Journal of Air Law	825

(The figure for the JOURNAL, of course, has increased considerably since the Ayer figures were compiled. The JOURNAL's net paid circulation as of June 30, 1956, was 67,281, and, on December 31, was well over 80,000.)

Such rapid growth prompts the question of "why?" The answer lies in the purpose of the magazine and in its fulfillment. *The Practical Lawyer* meets the need of the general practitioner for current information on the latest professional techniques for the better service of the client and for the more efficient operation of the law office. Its articles deal with daily problems of practice, telling how to meet and solve those problems, whether they include a phase of trial work, the drafting of a particular type of agreement, or the handling of a tax fraud case. For the law office they deal with such matters as maintenance of records, bookkeeping and accounting problems, and the form of a law partnership agreement. Included in the articles are graphic illustrations, forms, summary check lists and references.

Here, for the first time is a lawyer's periodical whose concern is not solely *theory*, which is so ably covered by law reviews, but *practice*. If an analogy may be drawn, *The Practical Lawyer* is doing for the legal profession what the *Journal of the American Medical Association* has been doing for the medical profession.

The success of *The Practical Lawyer* is now making possible a reduction in subscription rates for long term subscriptions. The members of the Bar will soon be offered a three-year subscription at $15.00. One year subscriptions at $6.00 will still continue and single issues can be had for $1.25. Apparently, you write 1601 Edison Highway, Baltimore 13, Maryland, the publication office, for subscriptions and The

American Law Institute, 133 S. 36th St., Philadelphia, Pennsylvania, concerning editorial content.

If I have one adverse criticism of this pamphlet published by and for those engaged in "trade", it is the failure to list in each issue the many invaluable monographs published from time to time by the American Law Institute. In the February, 1955, issue in introducing Tweed's piece the editor does tell us that "Lifetime and Testamentary Estate Planning", the monograph Tweed did with his partner, Bill Parsons, had then sold "over 13,000 copies". And in the March, 1955, issue there is a cover advertisement for "Price Discrimination and Related Problems under the Robinson-Patman Act" by Cyrus Austin, of the New York Bar. In the opinion of a great many of us, these two monographs remain to this day the best that the profession has to guide it in those fields. There ought to be a regular list published in each number itemizing all the A.L.I. monographs, giving the price and telling a fellow where The American Law Institute can be found. The Institute is not so well-known as its devoted members believe—as Tweed and Senator Pepper found out when they were obliged to move the membership of Dean Acheson, the principal speaker, at the annual meeting in Washington, D. C., this May. It is well they did as the speech of Mr. Acheson, reminiscing of his days as a law clerk for Brandeis, was the wittiest, the most delightful and charming one has ever heard.

URANIUM LAW: A little late, I want to comment on the outstanding issue that the *Rocky Mountain Law Review* of the University of Colorado published on uranium law. (Vol. 27, No. 4, June, 1955; price $1.50 per copy; address: 1200 University Avenue, Boulder, Colorado). Lawyers that represent mining interests and atomic installations will want this issue. The lead article by Professor Clyde O. Martz of Colorado Law School entitled "Pick and Shovel Mining Laws in an Atomic Age: a Case for Reform" is a splendid exposition of the low state of our mining law. It's a good piece for a city slicker like me, as I never knew that where a deposit is "bounded by solid 'country rock', it is called a lode" but if it is not so bounded "even though it is covered by hundreds of feet of superficial material, it is a placer" (page 377). Other pieces are: "Examining Titles of Unpatented Lode Mining Claims," by Donald J. Dufford and Warren L. Turner, of Grand Junction, Colorado; "Discovery Requirements and Rights Prior to Discovery on Uranium Claims on the Colorado Plateau", by William G. Waldeck, of Montrose, Colorado; "Uranium Mining Lease", by Kline D. Strong and Warren O. Martin of the *Rocky Mountain Law Review* staff; "Some Interesting Sidelights in the Development of the Uranium Industry", by Mitchell Melich, of Moab, Utah; "Federal Incentives to Uranium Mining", by John H. Tippit, of Denver, Colorado; "Federal Income Taxation of the Uranium Industry", by Floyd K. Haskell, of Denver, Colorado; "Mining and Marketing the Uranium", by William H. Nelson, of Grand Junction, Colorado; "State and Federal Securities Surveillance: Some Attendant Problems", by Allen S. Krakover and Irving M. Mehler, of Denver, Colorado; and "Atom Energy and the Atomic Energy Act of 1954", by Frank Norton, of Dallas, Texas.

CORAM NOBIS: Lawyers everywhere will be very much indebted to Professor Edwin W. Briggs, of the Montana Law School, for a very good artiele with respect to the writ of error *coram nobis*. It appears in the *Montana Law Review* (address, Missoula, Montana; price $1.50 per copy) at pages 160-189. (Vol. 17, No. 2, the spring issue of 1956). I'm sure the experience of all of us has been that the writ of error *coram nobis* is difficult to comprehend. In Professor Briggs' piece there is a very fine discussion of the theoretical basis upon which a court may predicate the allowance of the writ and he also has a good discussion of the proposed uniform statute of the Commissioners on Uniform State Laws. Lawyers who have to deal with this subject will find his article of great value. The difficulties Montana has experienced are typical of the ones other states have encountered, and the comparison Professor Briggs makes with other state decisions and with decisions by the United States Supreme Court gives his piece a national flavor.

CORPORATIONS: More practicing lawyers after they win or lose a lawsuit ought to write and tell the world about it. Edmund Stephan, of the Chicago Bar, who represented Wolfson in *Wolfson* v. *Avery*, 6 Ill. 2d 78, 126 N.E. 2d 701, writes most interestingly in the May, 1956, issue of the *Notre Dame Lawyer* (Vol. 31 No. 3, pages 351-380; price $1.25 per year; address Box 185, Notre Dame, Indiana). He entitles his piece an almost meaningless shibboleth",

"Cumulative Voting and Classified Boards: Some Reflections on Wolfson v. Avery". Reading it you think you are right at the argument, and even if you are, like me, a Washingtonian, you want to vote for Wolfson! It is extremely well-written. Mr. Stephan states that out of 1000 corporations listed on the New York Stock Exchange only 142 elect directors by classes and of these 43 per cent use cumulative voting. Cumulative voting came into being through a constitutional amendment adopted by the people of Illinois after the Erie swindle. It seems that although the opponents of Fisk and Gould held 4/9ths of the stock of Erie, they could not elect a single director. Where states permit cumulative voting only 10 per cent of the corporations elect to use it, so quoting G. K. Chesterton, Stephan says "it has not failed; it has not been used". When the Montgomery Ward board was cut from fifteen to nine directors, elected in classes of three per year, with as much as 33 1/3 per cent of the stock you could not elect one director. Thus, "the cumulative voting right, hailed as a great innovation in corporate democracy in 1870, had in the state of its birth reached a stage of dreary desuetude", page 361. And he says, "For several decades the voting rights of shareholders have been subjected to a continuous process of erosion to the point where 'corporate democracy' has become page 379. Rejoicing in his victory, Mr. Stephan says that the decision in *Wolfson* v. *Avery* that requires all nine Montgomery Ward directors to be elected in one year and permits as little as 10 per cent of the stock to elect one director, "narrows the heretofore constantly widening gap between ownership and control" page 380. This is a splendid piece of writing. It will be of great value to lawyers in other states that deal with corporations that have classified directors and cumulative voting. *Wolfson* v. *Avery* will have to be argued in other states in days to come.

TAXATION: The annual symposium of the Vanderbilt Law School which has always been so well done, is this year devoted to sales taxation. Those interested will want it. (Write Vanderbilt Law School at Nashville 5, Tennessee, and ask for the issue of the Vanderbilt Law Review for February, 1956, Vol. 9, No. 2 and send $2.00 for an unbound copy or $4.50 for a bound copy).

A Warning: Was It Justified?

(Continued from page 57)

> evident enough to induce the legislatures of three-fourths of the States to assent to the transfer, it may be fairly assumed that the transfer is not so essential after all. [Minor, *supra.*]

There is no evidence that this extension of the powers of the Federal Government and the destruction of the inherent powers of the states will diminish. The proposed federal aid to public schools would certainly result in the control of the schools by the Federal Government and cannot be justified by any clause in the Federal Constitution. Already, in the absence of the congressional legislative implementation which is called for by the Fourteenth Amendment, the Supreme Court has, in effect, supplied such legislation itself and then proceeded to strike down the constitutions and laws of many states. Even as recently as April 2, 1956, the same Court, with three Justices dissenting, affirmed a state supreme court decision which invalidated the sedition laws of the Commonwealth of Pennsylvania insofar as they apply to overthrowing the national government. This is accomplished by applying a judge-made rule that when a federal statute has occupied a field the dominant interest of the Federal Government precludes state intervention. This judge-made rule of interpretation was used to override and nullify the express provisions of the federal statute itself which stated: "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof". This statute had been construed in *Sexton* v. *California*, 189 U.S. 319, 324, 47 L. ed. 833, 835 (1903), but neither the federal statute nor the decision was honored by citation in the majority opinion. The net result is that the sedition laws in effect in all but six states of the Union are thus nullified insofar as they effect communist activities directed towards the overthrow of our national government. Fortunately, within forty-eight hours, a movement was started in Congress to expressly vest such powers in the states. Once again Congress may try to repair the damage inflicted by the Court's decision.

To Jefferson's charge that it is their peculiar maxim and creed that it is the office of a good judge to enlarge his jurisdiction other maxims and creeds far more destructive of the very foundations of our constitutional government may now be added. For example, one of the justices has written: "*Stare decisis* in constitutional law must give way before the dynamic components of history" (Douglas. *We, The Judges,* 1956). Stated in another way, previous decisions no matter how deeply embedded in our law are to yield before the dynamic components of history (whatever that means). And of course this leaves it for the judges

—no one else—to decide what are the "dynamic components of history" before which the former decisions must fall. As another example, a clerk of one of the Justices is quoted in this magazine (Vol. 42, page 314) as finding that the legislative history of the Fourteenth Amendment makes clear that it was not intended to abolish segregation immediately and then adds "but it did not foreclose to a Court the authority to find a different application under different circumstances years later". In plain language this means, "The Court can change this thing if it wants to." Such phrases as "The Constitution is a living thing", that it is to be adapted to modern conditions and that "The Constitution is what the court says it is" imply that they can think and say that it "means everything or nothing, at pleasure"—"They are then, in fact, the corps of sappers and miners, steadily working to undermine the independent rights of the states and to consolidate all power in the hands of that government in which they have so important a freehold estate". Jefferson, *supra.*

This is no attempt to appraise the economic consequences of the changes made by the decisions nor the wisdom of such changes in the law as a matter of national or governmental policy. The whole point of this brief sketch is that the changes in the law and in the Constitution have been made by the courts by a process of usurpation under the guileless label of "judicial construction". The laws should be changed by Congress and the Constitution should be changed by the states. The courts were granted no such power, but they have assumed it and there is no higher tribunal to which this usurpation may be appealed. "How can we expect impartial decision between the General government, of which they are themselves so eminent a part, and an individual State, *from which they have nothing to hope or fear?*" Possibly a constitutional amendment providing for termination of office of a justice by action of the legislatures of three fourths of the states might serve to impress them with the danger in their cavalier erasure of the powers of the states and their own usurpation of power. Certainly the Constitution should have some built-in protection against the destruction of the states to which the courts will render more observance than they now do to the Ninth and Tenth Amendments.

And why should not the Constitution be amended in the manner it itself provides? What is to hinder the Congress from proposing an amendment or a series of amendments that would more accurately define the spheres of power of the Federal Government and of the states? Or what is to hinder the legislatures of two thirds of the states from applying for a convention for proposing such amendments? Such a procedure would serve not only the salutary purpose of reminding the courts that the power of amendment resides in the states but might prevent the states from becoming "nothing more than mere municipal corporations with only such powers left them as the Federal Government may choose to allow."

The Laws Behind Our Roads

(Continued from page 18)

Solicitor for the Bureau. A bill to implement this project of providing a compact code of federal aid highway legislation is now pending before Congress.

While we are making some progress in this field, it seems to me that lawyers, and the Bar itself, must play a much bigger role in helping to solve the manifold problems we face.

I am aware of and want to pay tribute to the work that lawyers have done in promoting uniform traffic laws. An excellent job has been done and is being done by the American Bar Association in its traffic court program. Equally fine work is being accomplished through the Section of Municipal Law. But these are only segments of a much larger transportation problem —a problem that now calls for special emphasis to be directed to the legal aspects of highway improvement to ensure its sound development.

This means that we must make certain that our legislative tools are designed to promote—not hinder—progress, and thus help the highway administrator get on with the job of providing the kind of modern facilities we so badly need.

A good example of foresighted thinking in this area is a new legal device in land acquisition procedure which is now being followed in California, and in one or two other states.

In 1952, the California legislature established a revolving fund which now amounts to $30 million for the purchase of right-of-way for future highway improvements. Under past procedure, available funds for right-of-way could buy only a small part of the land needed to meet ever-increasing requirements resulting from large population increases and the consequent need for better transportation facilities.

The Act permits the highway department to use the earmarked funds to purchase such lands as are necessary for important projects, even though they may not be scheduled for construction in the im-

mediate future. Then when the project "matures", and the time comes for programing the work, the right-of-way advances are taken out of the highway funds currently allocated and the revolving fund is reimbursed to that extent.

In commenting on the advantages of this procedure before the Senate Public Works Committee in Washington several months ago, George T. McCoy, State Highway Engineer for California and President of the American Association of State Highway Officials stated: "We have acquired $20 million worth of property and our economics department figures that we have saved close to $200 million in the two to three years we have been operating on that basis."

Mr. McCoy also told the Senate Committee that if acquisition of certain rights-of-way had been deferred until commercial or residential development of the land had begun, costs to the people of California would have been ten to fifteen times as great in many instances. Surely, then, this is a good case to show how modernized law produces substantial economies.

California can anticipate similar savings with respect to future right of way acquisition because it has the legal authority to buy in advance. Certainly no state can afford to overlook potential savings of that huge size. When we consider the size of the cash dividends that are available in the immediate future, just in this one area, the effort of modernizing highway policies and the underlying law is one of the best investments we can make.

The law, in my opinion, should also define in broad outline the objectives sought. This can be done by a statement of legislative intent. We find it used in federal statutes. We are beginning to see it used more and more in state laws.

Good examples of this are found in recently enacted laws in North Dakota, in Florida and Louisiana. In these declarations of legislative intent the legislatures have said, in effect, to designated highway officials:

> We are placing a high degree of trust in your hands and are giving you individual and joint responsibilities for constructing, managing, improving and preserving the roads and streets of this state; in carrying out this responsibility your primary objective shall be to provide, within the limits of available funds, a unified system of adequate highways that will serve the best interests of all our people; within the restrictions imposed upon you by law, the planning, construction, and maintenance of our road facilities is left to your wisdom, judgment and integrity.

Another bright spot on the horizon, now beginning to take on real substance, is the national program of co-ordinated legal research, initiated two years ago at the request of the highway officials of this country. The program is being carried forward under the auspices of the Highway Research Board by a special Highway Laws Committee, on which I am privileged to serve as Chairman.

The project was originally undertaken on a limited scale with the help of a small research staff made available to the committee on a loan basis. But the urgency of the problem and the pressing need for accelerating the research soon became evident. As a result the project is now specially financed and staffed by five attorneys to complete the basic research within an estimated period of three years.

The Committee objectives are two-fold:

1. To assemble and analyze state constitutions and statutes as they relate to all highway functions, such as land acquisition, system classification, highway design, control of access, construction, maintenance, etc.
2. With the background of fact so derived, to isolate the important principles so that authorities throughout the country may help to determine which are basic for adequate law.

The membership of the Committee, which is in effect, a small technical committee, includes lawyers, as well as engineers, administrators and law professors. David R. Levin of the Bureau of Public Roads is the Committee Secretary.

I believe that the American Bar Association as an organization should be more directly identified with this project.

As all of you are aware, urban transportation presents many complex problems. Here, too, a National Committee on Urban Transportation has been established to consider ways and means of alleviating the traffic paralysis facing many of our cities.

The law, of course, must play a vital role in this work and a Subcommittee on the Characteristics of Legal Tools has been working on the legal phases of the problem. This is another area in which the American Bar can make a constructive contribution. For who is more qualified to make sure that the legislative tools of the transportation field are the best that can be devised than the legal profession itself?

Only through such co-operative endeavor can we hope to develop sound and progressive legal principles to:

1. Guide the lawmaker;
2. Promote efficient management;
3. Diminish time-consuming litigation in our courts.

Most important, modern laws keyed to the spirit of our times will help to ensure that in the years ahead the American people will travel with greater safety, efficiency and economy on the highways of this country.

Classified

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Books for Lawyers

(Continued from page 64)

the narrow sense. On the contrary, it is thoroughly practical as a basic text for the general practitioner who would familiarize himself with the principles of pensions. It cannot (and it does not purport to) serve as a guide through the highly technical complexities of pension planning nor as a hornbook for the creation and operation of pension trusts. However, it is an excellent means towards a general understanding and appreciation of the important problems in the pension field, and will serve admirably as source or background material to educate him who in the course of his practice must discuss with some degree of enlightenment pension planning with experts, such as insurance representatives, actuaries and trust officers.

The second volume, *Pensions: Problems and Trends,* is a series of lectures given by recognized authorities in the field, which has been compiled and edited by Professor McGill pursuant to the objective of the S. S. Huebner Foundation for Insurance Education to enrich insurance literature through the publication of current significant articles on the subject. The essays in this volume take up in greater detail some of the aspects of pensions which were broadly handled by Professor McGill in his work on *Fundamentals.* The first two essays explore the historical and economic bases of the present retirement system, both public and private. The third essay analyzes the various social forces which have combined in recent years to produce the multitude of private pensions which exist today. An excellent article by William N. Haddad discusses, from the tax expert's point of view, the federal income tax provisions which have had such a marked effect upon the development of private pensions.

The well-balanced volume also contains essays on the impact of private pensions on the economy, the effects of progressively declining mortality rates upon the cost and solvency of present plans, and the nature and detailed features of insured and trusteed plans. Of particular current interest is the critical analysis by William C. Greenough of the effect which price level changes have had on fixed annuities and what has been, and can be, done to meet the problem through the use of variable annuities. Mr. Greenough, as an officer of the Teachers Insurance and Annuity Association, which has pioneered the research on the problem of protecting the retired employee from the ravages of inflation and the consequent reduction in the purchasing power of his fixed annuity, has much learning to convey on this controversial issue. His description of the problem, the need for a solution, and the several attempts made in recent years to reach a satisfactory cure, and particularly the remedial plan adopted by his own organization through the establishment of the College Retirement Equities Fund, is well worth careful study.

While this volume of lectures or essays will not prove as generally useful to the practitioner for reference purposes as the work on *Fundamentals,* it will certainly be of real value to those who want to keep abreast of current developments in pension planning and to delve deeper into some of the more complex phases of the field which are merely outlined in Professor McGill's *Fundamentals.*

VANCE N. KIRBY

Chicago, Illinois